

EXHIBIT O

1
2 IN THE MATTER OF AN ARBITRATION UNDER
3 THE UNCITRAL ARBITRATION RULES BETWEEN

4 -----
5 TELENOR MOBILE

6 COMMUNICATIONS, AS,

7 Claimant,

8 TRANSCRIPT OF

9 vs.

10 PROCEEDINGS

11 STORM LLC,

12 Respondent.
13 -----

14
15 TRANSCRIPT of the stenographic notes
16 of the proceedings in the above-entitled
17 matter, as taken by and before BONNIE ATELLA
18 PRUSZYNSKI, a Certified Shorthand Reporter and
19 Notary Public, held at the offices of Orrick,
20 666 Fifth Avenue, New York, New York, on
21 Monday, August 14, 2006, commencing at 9:35
22 a.m.

23 BEFORE:

24 KENNETH R. FEINBERG, CHAIRMAN

25 WILLIAM R. JENTES, ARBITRATOR

GREGORY B. CRAIG, ARBITRATOR

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APPEARANCES:

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JAY K. MUSOFF, Partner

Orrick

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CHAIRMAN FEINBERG: Good morning, everybody, and thank you for all coming together today, and I thank everybody for their cooperation in e-mailing us, and keeping us up to speed on concerns and where we are, and what's going on, and we very much appreciate that.

Why don't we start, before I go any further, and just go around the table, and everybody introduce themselves, with your name, your affiliation, so we just know who the players are.

I'm Ken Feinberg, and I'm one of the three arbitrators.

ARBITRATOR JENTES: Bill Jentes, I'm another of the arbitrators.

MR. EKHOUGEN: Sigmund Ekhougen. I'm a Telenor officer in the Ukraine.

ARBITRATOR JENTES: Could you please spell your name, please. Great.

MR. SILLS: I'm Robert Sills. I'm a partner with Orrick. We represent the plaintiff in this matter.

MR. MUSOFF: Jim Musoff, also a

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partner with Orrick, and I also represent Telenor Mobile.

MR. O'DRISCOLL: Peter O'Driscoll. I'm a partner at Orrick based in London.

MR. HOGSTAD: Bjorn Hogstad, working out of Norway for Telenor.

MR. DIDKOVSKIY: I'm Oleksiy Didkovskiy. I'm counsel for Telenor in the Ukraine.

CHAIRMAN FEINBERG: In the Ukraine.

MS. FRIED: Lisa Fried. I'm an associate at Lovells.

MR. CHANG: Eric Chang, I'm an associate at Lovells.

MR. VAN TOL: Pieter Van Tol, partner at Lovells, acting for Storm in this matter.

ARBITRATOR CRAIG: I'm Gregory Craig, and I'm the third arbitrator from Williams & Connolly in Washington, D.C.

CHAIRMAN FEINBERG: Let me suggest that we are here on Storm's motion, so I would like Storm to explain its motion, why you brought the motion.

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2 This is an evidentiary hearing. It
3 is my understanding and the understanding
4 of the panel is that Storm will not have
5 live witnesses, at least today.

6 MR. SILLS: That's correct.

7 CHAIRMAN FEINBERG: They may or may
8 not have live witnesses on September 5th,
9 but as of today, I take it that Storm will
10 make its evidentiary submission on the
11 basis of sworn testimony, sworn
12 affidavits?

13 MR. SILLS: That's correct,
14 Mr. Chairman.

15 CHAIRMAN FEINBERG: Then I think we
16 should permit Storm to go forward with the
17 caveat, I guess, to ask up front from
18 Telenor whether Telenor, or Storm, for
19 that matter, have any objection to the
20 presence of a witness.

21 I take it you are a witness here
22 today, Mr. Ekhougen?

23 MR. EKHOUGEN: Yes.

24 CHAIRMAN FEINBERG: Does Storm care
25 whether Mr. Ekhougen remains in the room?

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1 Proceedings
2 MR. SILLS: If I may, Mr. Chairman,
3 my recommendation is the following:
4 Mr. Sills and I have thought it best to
5 waive formal openings and instead go
6 straight to the testimony.

7 With the tribunal's indulgence, I
8 have about a minute of remarks that are in
9 anticipation of Mr. Ekhougen's testimony,
10 then it might be best to go straight to
11 testimony. I can do cross-examination,
12 and we can actually do summations today if
13 Mr. Sills is ready, or we can talk about
14 that. That's the game plan I would
15 propose, if it works for the tribunal.

16 CHAIRMAN FEINBERG: Let me make sure
17 I understand.

18 Is it Storm's, other than about a
19 minute of an opening, it will await
20 summation, which at that time it plans in
21 the summation to highlight the sworn
22 testimony, is that its position?

23 MR. VAN TOL: That's correct.

24 MR. SILLS: Mr. Chairman, that would
25 not necessarily be Telenor's approach

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1 Proceedings
2 here. I think given the way in which the
3 case has been presented by Storm, and
4 given as you say that it's Storm's motion,
5 I mean, I am hardly in position to ask
6 Mr. Van Tol to speak for more than a
7 minute, but it seems to me that it's
8 appropriate, usually given the somewhat
9 unusual posture of this case, and as I
10 hope to explain, somewhat unusual
11 submission that's been made, I think it
12 would be helpful to the panel if the
13 parties were to expand somewhat more
14 extensively on their positions and what
15 they have claim to have proven and what
16 they hope to prove, not at great length,
17 but I think that would probably be in the
18 end more efficient.

19 CHAIRMAN FEINBERG: I can hear from
20 my fellow panelists. I don't really see
21 that it makes a whole lot of difference
22 whether it's called up front a submission
23 on the evidence or a summation and then
24 you have a chance to respond, I mean, I
25 don't, I am not sure it's going to make a

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1 Proceedings
2 whole bit of difference in light of what I
3 am hearing but my panelists may have a
4 different view.

5 MR. VAN TOL: Just to add,
6 Mr. Chairman, it would inform my summation
7 greatly if I could do it and refer to Mr.
8 Ekhougen's testimony in that summation.

9 CHAIRMAN FEINBERG: You will have a
10 chance to have a summation no matter what.
11 I guess the question is whether or not as
12 part of your motion you should elucidate
13 somewhat and expand on the sworn
14 testimony, but I am not, to me, it's sort
15 of six of one, half a dozen of the other.

16 I don't know if my co-panelists feel
17 any differently, as long as we hear what
18 we have to say.

19 ARBITRATOR CRAIG: I think, Storm,
20 should do what it wants to do.

21 MR. VAN TOL: With the tribunal's
22 indulgence, if I could take a minute
23 before Mr. Ekhougen testifies.

24 For the reason I am about to touch
25 on, we believe Mr. Ekhougen's testimony is

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<p>1 Proceedings</p> <p>2 actually unnecessary.</p> <p>3 I want to emphasize our</p> <p>4 cross-examination today is not a waiver of</p> <p>5 your fundamental argument which is the</p> <p>6 following in all the stacks of paper that</p> <p>7 you have in front of you, Telenor Mobile</p> <p>8 has supplied to us, there is not one scrap</p> <p>9 of evidence showing that there was in fact</p> <p>10 a meeting of participants in or around</p> <p>11 January 2004, that authorized the</p> <p>12 execution of the shareholders' agreement.</p> <p>13 That shareholders' agreement was a</p> <p>14 new shareholders' agreement. It was not</p> <p>15 the draft agreement that was damaged to</p> <p>16 the voting agreement from 2002, many</p> <p>17 months later, after lots of negotiation.</p> <p>18 Now, the Ukrainian courts have said</p> <p>19 they saw no evidence --</p> <p>20 ARBITRATOR JENTES: Could you be more</p> <p>21 precise on what was just said?</p> <p>22 MR. VAN TOL: I think it will come</p> <p>23 out in Mr. Ekhougen's testimony.</p> <p>24 ARBITRATOR JENTES: Right now I am</p> <p>25 unclear.</p>	<p>1 Proceedings</p> <p>2 MR. VAN TOL: Certainly. There was a</p> <p>3 draft agreement attached to a draft</p> <p>4 shareholders' agreement attached to the</p> <p>5 2002 voting agreement.</p> <p>6 Now, assuming there were resolutions</p> <p>7 authorizing the voting agreement in 2002,</p> <p>8 and I will come to that in a minute of</p> <p>9 what our assumption is, we have to assume</p> <p>10 for purposes of this hearing that there</p> <p>11 were, in fact, such resolutions, those</p> <p>12 resolutions do not authorize the</p> <p>13 shareholders' agreement that was signed in</p> <p>14 January 2004.</p> <p>15 You are going to hear testimony today</p> <p>16 that the agreement from January 2004 is</p> <p>17 materially different from the agreement</p> <p>18 that was appended to the voting agreement</p> <p>19 from 2002. It was the subject of heavy</p> <p>20 negotiation, last-minute negotiation, and</p> <p>21 in order to be signed up there needed to</p> <p>22 be a new board resolution, there needed to</p> <p>23 be new authority given to Mr. Nilov and</p> <p>24 there wasn't any.</p> <p>25 The Ukrainian court said there wasn't</p>
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<p>1 Proceedings</p> <p>2 any, we have asked everyone we can ask at</p> <p>3 Alpha or Storm or anyone else, they have</p> <p>4 no evidence. Mr. Sills hasn't given you</p> <p>5 evidence. He's given you a lot of</p> <p>6 information but there is not one document</p> <p>7 says Nilov had the authority in</p> <p>8 January 2004 because there was a meeting</p> <p>9 of participants, that's really the issue.</p> <p>10 Now, that means the Sphere Drake</p> <p>11 standard is easily met because all we have</p> <p>12 to do is come up with some evidence, some</p> <p>13 evidence that what the Ukraine court found</p> <p>14 was correct. That puts the burden on</p> <p>15 Telenor to show that there was no way the</p> <p>16 Ukraine courts could have come to that</p> <p>17 decision, and as we cited in our briefs,</p> <p>18 here is actually a standard on motions to</p> <p>19 compel arbitration which is functionally</p> <p>20 what Telenor Mobile is doing here.</p> <p>21 It's like summary judgment. They</p> <p>22 have to show there is no issue of fact.</p> <p>23 None.</p> <p>24 We would submit to the tribunal that</p> <p>25 at a minimum there is an issue of fact</p>	<p>1 Proceedings</p> <p>2 about whether or not there was a meeting</p> <p>3 of participants in January 2004.</p> <p>4 If that's the case, then it has to be</p> <p>5 heard by a court. The case law is clear</p> <p>6 on that. What Telenor Mobile is really</p> <p>7 trying to do here, we submit to the</p> <p>8 tribunal, is they are trying to have a</p> <p>9 hearing on either the ultimate merits or</p> <p>10 trying to use this tribunal as an</p> <p>11 appellate panel.</p> <p>12 It's --</p> <p>13 ARBITRATOR JENTES: What do you mean,</p> <p>14 an appellate panel?</p> <p>15 MR. VAN TOL: By that I mean, Telenor</p> <p>16 Mobile is asking this tribunal to revisit</p> <p>17 the findings of fact and the conclusions</p> <p>18 of law that were made by the Ukraine</p> <p>19 courts. And we would submit if that's</p> <p>20 what they are trying to do, and their</p> <p>21 brief reads like an appellate brief, they</p> <p>22 should have gone to the Ukraine courts and</p> <p>23 presented those arguments.</p> <p>24 We have all heard that they had the</p> <p>25 chance. They have even gone back recently</p>

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<p>1 Proceedings</p> <p>2 to a decision that was many months old and</p> <p>3 asked the Court to revisit it. They</p> <p>4 haven't done so here, and you are to ask</p> <p>5 yourself why.</p> <p>6 ARBITRATOR CRAIG: Does Storm concede</p> <p>7 that Nilov had the authority in 2002 to</p> <p>8 sign the shareholders' agreement, that</p> <p>9 there was a meeting of participants, that</p> <p>10 there was a polling of all at a meeting of</p> <p>11 participants in October that authorized</p> <p>12 the signing of the shareholders' agreement</p> <p>13 in 2002?</p> <p>14 MR. VAN TOL: I wish I could give you</p> <p>15 that representation today. I haven't been</p> <p>16 able to -- I was in contact with Storm, I</p> <p>17 was unaware of it until I saw Mr. Sill's</p> <p>18 papers. I would like to proceed today on</p> <p>19 the assumption there was a resolution, I</p> <p>20 haven't seen anything indicating that what</p> <p>21 Mr. Sills said about 2002 was wrong, I</p> <p>22 have no information it's a forgery.</p> <p>23 I have to say the circles on that are</p> <p>24 a bit amorphous. We haven't gotten all</p> <p>25 the information. All we have now on this</p>	<p>1 Proceedings</p> <p>2 in Telenor Mobile's version of the facts</p> <p>3 and we are trying to find out how.</p> <p>4 So, in brief answer to your question,</p> <p>5 I cannot concede that today, I would like</p> <p>6 to operate on the assumption that it</p> <p>7 exists.</p> <p>8 Now, what's important, and I am</p> <p>9 almost --</p> <p>10 ARBITRATOR JENTES: Sorry to keep</p> <p>11 interrupting your one minute.</p> <p>12 MR. VAN TOL: It's quite all right.</p> <p>13 ARBITRATOR JENTES: Aren't all the</p> <p>14 documents that are in the submissions from</p> <p>15 Telenor in the files of Storm?</p> <p>16 MR. VAN TOL: That's what I don't</p> <p>17 know. And this is complicated because</p> <p>18 there is more that you will see from the</p> <p>19 documents we are going to get to, there</p> <p>20 was more than Storm involved in this</p> <p>21 transaction.</p> <p>22 There is an Alpha entity called Alfa</p> <p>23 Bank. There are other Alpha entities that</p> <p>24 could have documents and that's what we</p> <p>25 are currently trying to ascertain.</p>
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<p>1 Proceedings</p> <p>2 I'm not doubting, for example, if</p> <p>3 there is an e-mail from an Alfa Bank</p> <p>4 person that is genuine or authentic. I</p> <p>5 have no basis to doubt that.</p> <p>6 What I haven't been able to do in the</p> <p>7 two business days since we have had</p> <p>8 Mr. Sills' papers is to go to my client</p> <p>9 and say please send me everything you have</p> <p>10 on this issue of the 2002 resolutions.</p> <p>11 And I would, I was surprised to actually</p> <p>12 find it out in the submissions that we</p> <p>13 received on Wednesday, I would have</p> <p>14 thought that would have been Telenor</p> <p>15 Mobile's initial reaction to our motion to</p> <p>16 dismiss, but I think this is all, you</p> <p>17 know, water under the bridge, because we</p> <p>18 are going to show today that what happened</p> <p>19 in 2002 has nothing to do with what should</p> <p>20 have happened in January 2004, when there</p> <p>21 was a new shareholders' agreement.</p> <p>22 CHAIRMAN FEINBERG: How are you going</p> <p>23 to show that today?</p> <p>24 MR. VAN TOL: Through the testimony</p> <p>25 of Mr. Ekhougen.</p>	<p>1 Proceedings</p> <p>2 CHAIRMAN FEINBERG: Their witness?</p> <p>3 MR. VAN TOL: Yes.</p> <p>4 CHAIRMAN FEINBERG: Through</p> <p>5 cross-examination of their witness, you</p> <p>6 are going to demonstrate that the 2002 has</p> <p>7 nothing to do with the 2004?</p> <p>8 MR. VAN TOL: Yes.</p> <p>9 CHAIRMAN FEINBERG: Without</p> <p>10 presenting a live witness?</p> <p>11 MR. VAN TOL: Yes.</p> <p>12 Now, what's interesting is that</p> <p>13 Telenor Mobile has not cited a single</p> <p>14 case, and we have weren't able to find one</p> <p>15 where a tribunal like this one overturned</p> <p>16 a prior court's determination that a</p> <p>17 contract didn't exist.</p> <p>18 CHAIRMAN FEINBERG: Let me just</p> <p>19 interrupt and just ask you whether you</p> <p>20 can't resist, Pieter, I think you are</p> <p>21 going from your one-minute evidentiary</p> <p>22 introduction to sort of your summation at</p> <p>23 lunchtime or whenever, if you are, that's</p> <p>24 fine, because I think Robert wants that,</p> <p>25 but I just want to remind you of your</p>

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<p>1 Proceedings</p> <p>2 comment earlier.</p> <p>3 MR. VAN TOL: And I was actually</p> <p>4 done.</p> <p>5 My last line, Mr. Chairman, was in</p> <p>6 short, gentlemen, my point is that the</p> <p>7 direct examination of Mr. Ekhougen is</p> <p>8 unnecessary, in that it's not going to --</p> <p>9 he's not going to be able to tell you,</p> <p>10 unless I am wrong, that there was meeting</p> <p>11 of participants in January 2004, but I</p> <p>12 think cross-examination will be useful</p> <p>13 because we will show that there is a wedge</p> <p>14 between what happened in 2002, and what</p> <p>15 happened in 2004, and with that, I am</p> <p>16 happy to turn the witness over.</p> <p>17 ARBITRATOR JENTES: One final</p> <p>18 question, from me at least.</p> <p>19 How do you expect to show that there</p> <p>20 is a difference between the 2002, I gather</p> <p>21 in your view, draft shareholders'</p> <p>22 agreement and the one that was signed in</p> <p>23 2004?</p> <p>24 MR. VAN TOL: Well, Storm's been --</p> <p>25 I'm sorry, Telenor Mobile has been kind</p>	<p>1 Proceedings</p> <p>2 enough to do that for us because their</p> <p>3 lawyer did a black line showing the</p> <p>4 differences between what was proposed.</p> <p>5 Basically it was close to the draft from</p> <p>6 2002.</p> <p>7 And when it was finally signed up, we</p> <p>8 are going to see that in Exhibit W to</p> <p>9 Telenor's brief, I'm going to go through</p> <p>10 with Mr. Ekhougen who was involved in the</p> <p>11 transactions that were their negotiations,</p> <p>12 that authority to go forward were the</p> <p>13 voting agreement that then contemplates a</p> <p>14 later shareholders' agreement is not</p> <p>15 authority to sign a completely different</p> <p>16 document in 2004.</p> <p>17 ARBITRATOR JENTES: I'm sorry to be</p> <p>18 so precise, but I am trying to find out in</p> <p>19 the last statement you made, is he or</p> <p>20 somebody else going to say, well, this was</p> <p>21 a substantial difference and, therefore,</p> <p>22 it was not authorized, or are you going to</p> <p>23 argue from the black line version that we</p> <p>24 are supposed to conclude as a matter of</p> <p>25 law that it was substantially different.</p>
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<p>1 Proceedings</p> <p>2 In other words, we are back to where</p> <p>3 we have been all along as far as I think</p> <p>4 the panel's concerned, what's the evidence</p> <p>5 that we are dealing with.</p> <p>6 MR. VAN TOL: I'm hoping to establish</p> <p>7 today with Mr. Ekhougen facts, and from</p> <p>8 those facts I will ask the tribunal to</p> <p>9 draw the factual conclusion that the</p> <p>10 agreement, the draft agreement appended to</p> <p>11 the 2002 voting agreement is not the same</p> <p>12 as the agreement that was signed up in</p> <p>13 January 2004, and that the power, any</p> <p>14 certificate or power of attorney given to</p> <p>15 Mr. Nilov in 2002. It can't be effective</p> <p>16 that many months later for a brand new</p> <p>17 agreement.</p> <p>18 ARBITRATOR JENTES: But isn't a brand</p> <p>19 new agreement, I mean, it's evident that</p> <p>20 it's not brand new. But what I am trying</p> <p>21 to get it at is: You have to show that it</p> <p>22 was, I guess, so different that there</p> <p>23 couldn't have been authority carrying</p> <p>24 forward for two years.</p> <p>25 What I am trying to find out is: Is</p>	<p>1 Proceedings</p> <p>2 there going to be a witness that is going</p> <p>3 to say that or is that something you are</p> <p>4 arguing we should conclude?</p> <p>5 MR. VAN TOL: I think the documents</p> <p>6 we will see today will show there are</p> <p>7 material differences between the two. I</p> <p>8 think Mr. Ekhougen's testimony will show</p> <p>9 it, and we will argue the differences that</p> <p>10 can be drawn from those facts.</p> <p>11 MR. SILLS: Thank you, Mr. Chairman.</p> <p>12 Well, I am glad to see that Storm has</p> <p>13 apparently abandoned the principal or the</p> <p>14 approach it took in the papers submitted</p> <p>15 here arguing that no hearing was</p> <p>16 necessary. Now that I intend to pursue</p> <p>17 evidentiary hearing that was ordered when</p> <p>18 we were last here in New York, but to the</p> <p>19 extent that Storm's case now focuses on</p> <p>20 the differences between the document</p> <p>21 approved in 2002, and the document signed</p> <p>22 in 2004, I'm not sure what can be</p> <p>23 established through cross-examination.</p> <p>24 The text of the two documents, the</p> <p>25 differences between the text of the two</p>

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<p>1 Proceedings</p> <p>2 documents is what it is. And we would not</p> <p>3 dispute that it's somewhat different.</p> <p>4 What the evidence that we have</p> <p>5 submitted shows and what Mr. Ekhougen's</p> <p>6 testimony will again bring before the</p> <p>7 tribunal is that not only were those</p> <p>8 differences not substantial, and the</p> <p>9 agreement is largely the same as the one</p> <p>10 what was authorized, but these changes</p> <p>11 were made at the express request and over</p> <p>12 the initial objection of Telenor, and it</p> <p>13 behooves, I think, and I am sure the</p> <p>14 tribunal will conclude, Storm having put</p> <p>15 in no evidence, still apparently not in</p> <p>16 control of its own records to be waging</p> <p>17 this war on an agreement it signed and</p> <p>18 under which it lived for well over a year</p> <p>19 to have requested that change and now</p> <p>20 argue that because Telenor in the spirit</p> <p>21 of the cooperation negotiated the one</p> <p>22 substantive point for which a change was</p> <p>23 requested by Storm, and then there was an</p> <p>24 extensive record saying we are ready to</p> <p>25 execute, Mr. Nilov is the appropriate</p>	<p>1 Proceedings</p> <p>2 party, he's prepared to execute.</p> <p>3 In fact, there is, as you know in the</p> <p>4 record, evidence that Mr. Nilov was out of</p> <p>5 Kiev on the date that the parties had</p> <p>6 agreed to for signing, which in fact had</p> <p>7 been extended at Storm's request.</p> <p>8 We were asked if we would take a fax</p> <p>9 signature, the document was then signed in</p> <p>10 effect three times, by fax by Mr. Nilov,</p> <p>11 then the English version of text was</p> <p>12 signed by Mr. Nilov what he returned to</p> <p>13 Kiev, and sometime later the Ukraine</p> <p>14 version was signed.</p> <p>15 I will note in the application that</p> <p>16 Storm, an argument was made that the</p> <p>17 contract should be in Ukrainian, not</p> <p>18 surprising there, neither party there</p> <p>19 pointed out that the contract was in</p> <p>20 Ukrainian.</p> <p>21 At the closing of this contract, two</p> <p>22 certificates were delivered, one signed by</p> <p>23 the chairman of Storm, attesting to the</p> <p>24 fact Mr. Nilov had authority.</p> <p>25 We have all agreed that Sphere Drake</p>
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<p>1 Proceedings</p> <p>2 sets out the appropriate standard here,</p> <p>3 and I think rather than what Storm's</p> <p>4 counsel says Sphere Drake means or what I</p> <p>5 say it means, we ought to look to the</p> <p>6 language of it.</p> <p>7 CHAIRMAN FEINBERG: Mr. Sills, let me</p> <p>8 also ask you whether, are you summing up</p> <p>9 now or do you have a witness right here?</p> <p>10 MR. SILLS: I have a witness and I</p> <p>11 simply want to anticipate his testimony.</p> <p>12 We will have a lot more to say on</p> <p>13 summation.</p> <p>14 MR. VAN TOL: Perhaps I should have</p> <p>15 said something when I was exposing or</p> <p>16 revealing my cross-examination to the</p> <p>17 witness. I don't know if the witness</p> <p>18 should be present for Mr. Sills' remarks</p> <p>19 telling him what to say.</p> <p>20 CHAIRMAN FEINBERG: Go ahead. You</p> <p>21 just want to make a point and then have</p> <p>22 the witness testify, is that it?</p> <p>23 MR. SILLS: I don't think that was</p> <p>24 called for. If Mr. Van Tol would like the</p> <p>25 witness to leave, I have no objection.</p>	<p>1 Proceedings</p> <p>2 CHAIRMAN FEINBERG: What is it you</p> <p>3 want to add, Mr. Sills, before we get on</p> <p>4 to the direct examination of the</p> <p>5 testimony?</p> <p>6 MR. SILLS: Only this, that the tests</p> <p>7 of Sphere Drake, which is at page six of</p> <p>8 the copies that is annexed to Storm papers</p> <p>9 said this, the rule that an agent that has</p> <p>10 been charged with negotiating the contract</p> <p>11 on behalf of the principle acts outside</p> <p>12 the scope of its agency and in the Court's</p> <p>13 emphasis and the opposing party knows</p> <p>14 this, the agent has both actual and</p> <p>15 apparent authority and the agent is not --</p> <p>16 there was an authorization, Mr. Nilov,</p> <p>17 both as a matter of his office as general</p> <p>18 director and as a matter of the express</p> <p>19 authorization in 2002, had actual</p> <p>20 authority.</p> <p>21 We were told he had authority, and</p> <p>22 there isn't a shred of evidence that has</p> <p>23 been adduced that anyone ever advised</p> <p>24 Telenor that Mr. Nilov was acting outside</p> <p>25 of the scope of his authority for the very</p>

<p style="text-align: right;">Page 26</p> <p>1 Proceedings</p> <p>2 good reason he was perfectly authorized.</p> <p>3 ARBITRATOR JENTES: Could I ask one</p> <p>4 question of both sides?</p> <p>5 What is the position of Storm as to</p> <p>6 the controlling law governing this</p> <p>7 question of whether the contract was void?</p> <p>8 Mr. Sills has just referred to New York</p> <p>9 law. What's your position? Is that the,</p> <p>10 is that what controls here?</p> <p>11 MR. VAN TOL: No. Our position, and</p> <p>12 I am sure in my much anticipated summation</p> <p>13 is that Ukraine law controls whether or</p> <p>14 not there was a contract.</p> <p>15 ARBITRATOR JENTES: Do we know what</p> <p>16 Ukrainian law says? Is it the same as New</p> <p>17 York law on the issues that Mr. Sills just</p> <p>18 raised?</p> <p>19 MR. VAN TOL: All we know about</p> <p>20 Ukrainian law is what is in Mr. Rabij's</p> <p>21 affidavit, who is Telenor's expert</p> <p>22 witness.</p> <p>23 Now, what I will show in summation is</p> <p>24 that even under that standard, if that is</p> <p>25 the case, Telenor Mobile still can't show</p>	<p style="text-align: right;">Page 27</p> <p>1 Proceedings</p> <p>2 that Mr. Nilov had all actual authority or</p> <p>3 that he was allowed to rely on Mr. Nilov's</p> <p>4 authority.</p> <p>5 That is definitely part of our</p> <p>6 presentation. Even if you assume</p> <p>7 Mr. Rabij is right --</p> <p>8 ARBITRATOR JENTES: As to Ukrainian</p> <p>9 law?</p> <p>10 MR. VAN TOL: -- as to Ukrainian law,</p> <p>11 because we have no evidence to rebut.</p> <p>12 Even if you assume that, Telenor Mobile</p> <p>13 can't make a showing.</p> <p>14 MR. SILLS: Our position is that New</p> <p>15 York law governs, that the parties elected</p> <p>16 New York law in the contract, the Indosuez</p> <p>17 case which we cited and discussed at the</p> <p>18 last hearing is absolutely clear on that</p> <p>19 once the parties elected New York law in a</p> <p>20 contract, New York law governs, and</p> <p>21 Ukrainian law, the parties ousted</p> <p>22 Ukrainian law, and it was an entirely</p> <p>23 voluntary act.</p> <p>24 Notwithstanding that, I'm glad to</p> <p>25 hear that Mr. Rabij's testimony is the</p>
<p style="text-align: right;">Page 28</p> <p>1 Proceedings</p> <p>2 only testimony on this point.</p> <p>3 Ukrainian law is essentially the</p> <p>4 same, so it's to some extent a false</p> <p>5 conflict. As Mr. Rabij points out, there</p> <p>6 was actual authority from the 2002</p> <p>7 authorization and from Mr. Nilov's status</p> <p>8 as general director, which confers very</p> <p>9 broad powers on him under Ukrainian law.</p> <p>10 Ukrainian law also follows the same</p> <p>11 principle that Sphere Drake does. If an</p> <p>12 agent author to have authority is acting</p> <p>13 within the apparent scope of that</p> <p>14 authority and the counterparty isn't aware</p> <p>15 of any limitation, I believe it's Section</p> <p>16 92 of the Ukrainian Civil Code, then the</p> <p>17 lack of actual authority would be</p> <p>18 irrelevant, so I think in some sense it's</p> <p>19 a false conflict because as Mr. Rabij</p> <p>20 points out, that is the only information</p> <p>21 we have to that Ukrainian law and New York</p> <p>22 law are essentially the same on this</p> <p>23 point.</p> <p>24 CHAIRMAN FEINBERG: We have a witness</p> <p>25 here, Mr. Sills. Why don't we proceed?</p>	<p style="text-align: right;">Page 29</p> <p>1 Ekhougen/Direct-Sills</p> <p>2 When the witness takes the oath, will</p> <p>3 everybody please pay attention.</p> <p>4 MR. SILLS: We call Sigmund Ekhougen.</p> <p>5 SIGMUND EKHOUGEN,</p> <p>6 called as a witness, having been duly</p> <p>7 sworn by a Notary Public, was examined</p> <p>8 and testified as follows:</p> <p>9 CHAIRMAN FEINBERG: Proceed.</p> <p>10 MR. SILLS: Thank you, Mr. Chairman.</p> <p>11 DIRECT EXAMINATION</p> <p>12 BY MR. SILLS:</p> <p>13 Q. Mr. Ekhougen, could you please state</p> <p>14 your name for the record?</p> <p>15 A. My name is Sigmund Ekhougen.</p> <p>16 Q. Mr. Ekhougen, are you a native</p> <p>17 speaker of English?</p> <p>18 A. No. My native language is Norwegian.</p> <p>19 Q. Do you believe yourself able to</p> <p>20 testify in English?</p> <p>21 A. I do, but I must have the possibility</p> <p>22 to ask some questions sometimes, to rephrase</p> <p>23 questions.</p> <p>24 CHAIRMAN FEINBERG: Let me just say a</p> <p>25 couple of suggestions. Speak loudly,</p>

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speak slowly, and the only person more
than any other that you have to satisfy is
this woman right here. So, if there is
problems, you will hear from her.

Speak in her direction, because she
is the one that has to transcribe this.

THE WITNESS: I will.

ARBITRATOR JENTES: You should also
understand, this is true of every witness.
If you don't understand a question fully,
ask and it can be explained to you or
expanded or restated. That's your right
as a witness.

THE WITNESS: I will do.

BY MR. SILLS:

Q. Mr. Ekhougen, where do you live?

A. I'm living in Norway, but I also have
a flat in Kiev.

Q. By whom are you employed?

A. I'm employed by Telenor Mobile, the
mother company of Telenor Mobile.

**Q. What is your current position with
Telenor?**

A. I'm the head of Telenor

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representative office in Kiev. We call it
representative office in Kiev.

CHAIRMAN FEINBERG: The Ukraine.

**Q. For how long have you been country
manager in Ukraine?**

A. Since January 2003.

**Q. Could you briefly describe for the
panel your duties and responsibilities as
country manager for Telenor in Ukraine?**

A. As country manager, we are Telenor
representative on the ground in Kiev. We are
talking care of our business in Kiev, in
Ukraine, and also taking care of governmental
relation and other sort of stuff in Kiev, in
Ukraine.

**Q. When did you first assume your
position for Telenor in Ukraine?**

A. I started as country manager in
January 2003, but previous, I have also been
expert to Kyivstar, I was vice president and
deputy general director in '98 and part of '99.

**Q. As the country manager in Ukraine,
can you estimate for the panel what percentage
of your time you spend working on Kyivstar**

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matters as opposed to matters involving some
other investment of the company?

A. Kyivstar represents 95 or more
percentage of our investment in Ukraine, so I
spend as much of my time on Kyivstar matters.

**Q. Before you took over your duties and
responsibilities as country manager, was there
some other Telenor executive who was generally
responsible for --**

A. There was complimentary, there was a
previous country manager that left which took
over.

Q. Who was he or she?

A. His name was Hallvard Austlid.

**Q. Are you familiar with the Telenor
executive name Egil Hansen?**

A. He was working in M & A department in
Oslo, and I know he was negotiating the first,
the voting agreement. But I have never been
working directly with Mr. Hansen.

MR. SILLS: Could we go off the
record for just one second?

(Recess taken.)

Q. Was Mr. Hansen, to your knowledge,

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the Telenor executive responsible for
negotiating the 2002 voting agreement and the
draft shareholders' agreement?

A. Yes.

**Q. Do you know why it is that Mr. Hansen
is no longer actively working at Telenor?**

A. He got cancer. He got cancer and he
is retired.

**Q. When you took over your duties and
responsibilities, Mr. Ekhougen, in 2003, were
you aware of the voting agreement that had been
executed by the parties?**

A. Yeah. I was told by Mr. Austlid and
I was shown the agreement, and I tried to
familiarize myself with the agreement as soon as
possible after taking over.

**Q. In your review of the voting
agreement, did you also review a shareholders'
agreement that was attached to it?**

A. Yes.

MR. SILLS: Mr. Chairman, rather than
marking loose copies and having additional
exhibits, it seems to me in the keeping
with the spirit of arbitration, it would

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be easiest if we referred to the documents
that have already been supplied to the
tribunal.

CHAIRMAN FEINBERG: That will be
fine. At the end of the hearing, just
make sure there is agreement on the record
as to which documents are marked as to
what exhibit.

MR. SILLS: Thank you very much.

MR. VAN TOL: If I could just ask
Mr. Sills, I am sure I will do the same
thing. There are letters for both, what's
attached to our brief and what's attached
to the affidavit. If we could all be
clear about whether we are talking to
something attached to the brief --

MR. SILLS: That was my plan, but
then you --

MR. VAN TOL: I figured it was.

**Q. Let me place before you, Mr.
Ekhougen, what has been previously marked
as Exhibit 1 to the evidentiary brief in
opposition to Storm's motion to dismiss.
I ask you if you are familiar with**

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that.

A. Yes. This is the voting agreement as
I have it in my files.

**Q. Directing your attention to the
portion of that document following page 44,
which is entitled Shareholders' Agreement, and
then there is a blank between and among,
Telenor, Storm and Kyivstar?**

A. Yes.

**Q. Is this the voting agreement to which
you previously referred?**

MR. VAN TOL: I think you mean
shareholders' agreement.

MR. SILLS: I'm sorry.

**Q. The shareholders' agreement to which
you previously referred?**

A. Yes, it is, as far as I can see.

MR. SILLS: Mr. Chairman, I offer
Exhibit I to Telenor's brief in evidence.

MR. VAN TOL: No objection from
Storm.

CHAIRMAN FEINBERG: Admitted.

MR. SILLS: Thank you.

(Exhibit I, received in evidence, as

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of this date.)

ARBITRATOR JENTES: Gentlemen, to
save time on the offers, et cetera, is
there any objection from Storm to any of
the documents in the so-called evidentiary
brief, that is Exhibits A through EE, so
we don't have to go through the offer
every time.

MR. VAN TOL: I don't believe there
is. If something strikes me, I will bring
it up; otherwise, I think our operating
presumption should be on authenticity. We
are fine.

MR. SILLS: Thank you.

**Q. Mr. Ekhougen, could you explain to
the panel, please, your understanding of the
relationship between the voting agreement, which
is the first part of Exhibit I, and the
shareholders' agreement, which is the second
part of Exhibit I?**

A. As I said, I was not part of the
negotiations. I have seen it only as a
document. My understanding is the voting
agreement was to govern the relation between

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Storm and Telenor while dealing with a third
shareholder namely Omega, and that the
shareholders' agreement should be enforced when
Omega leaves the company.

**Q. Can you explain to the panel your
understanding of the reason why the parties
agreed on this two-step process, that is, first
to enter into a voting agreement and then to
enter into a shareholders' agreement?**

A. As far as I understood, Omega was
quite a troublesome partner, especially when it
comes to finance the company's operation, and
both Storm and Telenor agreed that they had to
get that partner out of the company.

**Q. Was there anything between Storm on
the one hand and Telenor on the other regarding
the purchase of Omega's shares or its interest
in Kyivstar?**

A. No. One of the, I don't know if
obligation is the right expression, but one,
Telenor expected and had agreed with Storm that
they should buy up Omega's shares.

MR. SILLS: Off the record for one
second.

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(Discussion held off the record.)

ARBITRATOR CRAIG: Just to clarify, Storm was to purchase Omega's shares?

THE WITNESS: Storm or Alpha, as far as I understand. It could have been both, or either, or Alpha affiliate.

Q. Mr. Ekhougen, is it your understanding that there was an earlier 1998 shareholders' agreement in place at the time that you took over your duties and responsibilities?

A. Yes. Actually, I was vice president in the company when this agreement was signed in '98.

Q. And who were the parties to that 1998 agreement?

A. In principle was Storm, Telenor, Omega, and Sputnik, and if I remember right, it was two or three Sputnik companies, I'm not sure.

Q. What became of the Sputnik interest in Kyivstar?

A. Now, we are asking questions from a period where I am not working with Kyivstar, but

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Sputnik interest was bought partly, as I understand, partly by Telenor and partly by Storm.

Q. Until Omega shares had been purchased, would it have been possible as you understand it to terminate the 1998 shareholders' agreement?

A. No. It gave Omega sort of rights that they were not willing to give away.

Q. And what is your understanding of the agreement of the parties regarding execution of the 200-, what we will call now the 2004 shareholders' agreement once the Omega shares were purchased?

A. The agreement, the voting agreement says that the shareholder, new shareholders' agreement should be signed within, I think it was, three working days after the closing of the Omega deal.

ARBITRATOR CRAIG: Did you mean the 2004 shareholders' agreement or the 2002 shareholders' agreement?

THE WITNESS: I meant the 2004.

MR. SILLS: Well, I guess it's our

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position, Mr. Craig, that they are the same, but, perhaps if we were to call it the new shareholders' agreement.

ARBITRATOR CRAIG: Fine.

CHAIRMAN FEINBERG: It's your case. Go ahead.

BY MR. SILLS:

Q. Mr. Ekhougen, did there come a time when you began discussions with Alpha or Storm of the progress that they were making in purchasing Omega?

A. Yes. Omega transaction was important for the progress of the company, and we were not involved in the Omega transaction. I start asking questions about the progress, I think in spring of 2003, and I was told by the two Storm members of the board, namely Yuri Tumanov and Andrey Kosogov, that the correct one to discuss this issue with was Andre Khudyakov.

ARBITRATOR JENTES: Who is he?

THE WITNESS: He was -- at that time he was, we were told that he was the guy in Alpha system in charge of taking care of the day-to-day business with relation

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to Kyivstar, and he was also participating in all board meetings from the time I started participating. And I, I addressed him and asked for a time schedule for the -- for the Omega transaction.

ARBITRATOR CRAIG: This was in 2003?

THE WITNESS: This was before the summer in 2003, yes.

Q. Did there come a time when Mr. Kulikov informed you that Alpha was getting close to a purchase of Omega?

A. After the summer, I got a timeline from him, a time schedule, and that was sort of, it was changing a bit, but we still got information that they were getting closer and closed, and in November, mid-November, we got the message that the deal was almost closed and that we should prepare for closing of the shareholders' agreement.

Q. Let me direct your attention to Exhibit Q to the Telenor brief, if I could.

A. Yes. This is the e-mail I wrote on the 4th of November asking about the progress. And where I got an answer from Mr. Khudyakov

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2 about the progress, that it still needed some
3 weeks, but it also asked about the new
4 shareholders' agreement and he confirmed that we
5 agreed on some small technical changes in the
6 agreement, but otherwise they were prepared to
7 sign the agreement.

8 **Q. What were those technical changes?**

9 A. In 2003 -- no, in 2002, Kyivstar was
10 in quite a difficult financial situation and
11 Ericsson came up, and they offered vendor
12 financing, and this was reflected in the
13 proposed shareholders' agreement, but as
14 Kyivstar succeeded to get Euro bond later in
15 2002, this loan was repaid, and we had to make
16 those changes in the shareholders' agreement.

17 Otherwise, there were no other
18 changes and dates and things like that.

19 **Q. Directing your attention to the**
20 **e-mail, which is on the top portion of the first**
21 **page, do you recall receiving this e-mail from**
22 **Mr. Khudyakov?**

23 A. Yes.

24 **Q. Now, did you respond to**
25 **Mr. Khudyakov's request to proceed to sign the**

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2 surprised when, when the two Storm
3 representatives raised the question of making
4 changes to the draft of the shareholders'
5 agreement.

6 **Q. Did anyone from Telenor at that**
7 **meeting suggest any changes to the shareholders'**
8 **agreement?**

9 A. No.

10 **Q. Do you recall what changes were**
11 **suggested or requested?**

12 A. We asked to get it in writing, and I
13 think the proposal is enclosed here, it's too --
14 it's, they propose changes in two articles
15 regarding the termination clauses.

16 ARBITRATOR CRAIG: Could I ask a
17 question about this document, are you
18 moving on?

19 MR. SILLS: I am.

20 ARBITRATOR CRAIG: Would it be
21 appropriate, Mr. Chairman, if we have
22 questions, go along?

23 Referring to your e-mail, there is a
24 second page that appears to be from you to
25 Mr. Khudyakov.

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2 **2002 agreement with some technical changes?**

3 A. I mean, they may -- that we agree on
4 the text, so I kept contact with him to progress
5 on the closing of the Omega deal. But formally
6 the next, the next time we met was during a
7 board meeting in Kyivstar one month later in
8 early December 2003.

9 **Q. Was that the meeting of**
10 **December 11th?**

11 A. Yes.

12 **Q. Who was present at that meeting?**

13 A. From Storm was -- I was present,
14 Mr. Khudyakov was present, but from Storm the
15 two ordinary representatives, two ordinary
16 directors of the board, namely Mr. Tumanov and
17 Mr. Kosogov was present. I don't remember. It
18 was one of Telenor directors who was not
19 present. So I was, I was representing Telenor
20 also in the board.

21 **Q. Was there any discussion at this**
22 **board meeting about the progress of the Omega**
23 **transaction?**

24 A. They have informed us that the Omega
25 transaction now was closed, but we were really

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2 THE WITNESS: Yes.

3 ARBITRATOR CRAIG: Is that, in fact,
4 an e-mail that you sent?

5 THE WITNESS: That is an e-mail I
6 sent.

7 ARBITRATOR CRAIG: In that e-mail,
8 you refer to at the top, I hope that
9 everything, that everything is developing
10 according to your roadmap. In case
11 closing should take place this week and
12 termination of the existing shareholders'
13 agreement and signing of a new should take
14 place very soon, next week.

15 When you talk about the existing
16 shareholders' agreement in that e-mail
17 dated 2003, what shareholders' agreement
18 are you referring to?

19 THE WITNESS: Shareholders' agreement
20 from '98.

21 ARBITRATOR CRAIG: That is the 1998
22 one? It's not the one that was --

23 THE WITNESS: No, '98 agreement. We
24 had to terminate that before we went into
25 the new one.

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Q. Maybe it would be helpful, Mr. Ekhougen, if you would briefly summarize the formal steps that the parties had agreed to take with respect to the 1998 agreement, the voting agreement, and the new shareholders' agreement.

What was the sequence in which those agreements would be executed or terminated?

A. I mean, as we said earlier, the first step was sort of the closing of the Omega transaction, then we should be informed in a proper way about the transaction, about the closing. Then we had to terminate the existing shareholders' agreement, and go into a new shareholders' agreement as proposed in the letter from -- in the voting agreement from 2002, and then we should finally do some share transaction, get back to a level of 56.5 percent to Telenor and 43.5 percent to Storm.

Q. And what was your understanding of the relationship between the voting agreement as executed in 2002, and the new shareholders' agreement?

MR. VAN TOL: I think that has been asked and answered already.

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And as you may notice, this is dated December 17th is quite close to western Christmas, and then there is two weeks of Ukrainian or other documents, Christmas coming after. So we accepted the waiver and we have decided to postpone or to prolong the period for signing until the end of January.

Q. By the way, you see that Mr. Nilov signed this document?

ARBITRATOR CRAIG: Are you talking about S?

MR. SILLS: Exhibit S, yes.

A. Yes, yes, Mr. Nilov signed it as general director of Storm. Mr. Nilov always signed relevant documents from Storm.

Q. Did anyone suggest at the time he signed this document that he lacked authority to agree to this extension?

A. No, none whatsoever.

Q. Let me direct your attention to Exhibit U to the Telenor brief.

A. Yes.

Q. Have you seen these documents before?

A. Yes. This are made regarding wording

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A. The Telenor position the whole time has been that we should execute the shareholders' agreement as it was attached to the -- to the voting agreement, except for those technical changes, and that was, as I said, the Ericsson debt, and actual dates and things like that.

Q. Let me direct your attention to Exhibit S to the Telenor brief, if I could.

A. Yes.

Q. Do you recall receiving a copy of this document?

A. This letter is sent by me.

Q. Do you recall receiving a copy signed by Mr. Nilov?

A. Yes. The reason why, should I explain the reason?

MR. SILLS: Please.

A. The reason was that it turned out that two affiliates had bought Omega as is. They would like to transfer the Omega shares to Storm, and they asked for a waiver on the three-day period, because they were not able to do all this transaction within three-day period.

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of the shareholder agreement, but could I comment on what's led up to this document?

Q. I was about to ask.

A. Because as I said, on the board meeting, in December, 11th of December, the two, the two Storm directors relate to the issue of making changes in the new shareholders' agreement.

We got, we got a written proposal and I sent an answer after considering this proposal. I think that's all an exhibit here. I am not sure.

You know better these numbers than me. It's Exhibit R.

I sent an answer to Storm where we said that we did not appreciate this last-minute request for changes, that to your position was as we had agreed in the voting agreement that the shareholders' agreement should be executed as it was, but we said that we were willing to negotiate later after signing of the agreement.

And then I proposed a meeting for -- we proposed a meeting in December to sign the deal.

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Q. And after you had sent your letter rejecting Storm's proposal to modify the agreement, did Storm write back?

A. They did not address to me, but the two Storm directors in Kyivstar board of directors sent a letter to one of the directors from Telenor and copied the three others urging Telenor not to take my position but to be willing to negotiate these termination clauses.

Q. Let me turn your attention to Exhibit T to the Telenor brief, if I could.

A. Yes, this letter was never sent to me, but I was, I got a copy from my colleagues in Oslo.

Q. Who is Mr. Gustad to whom the letter is addressed?

A. Mr. Gustad was the executive vice president in Telenor in Oslo responsible for Kyivstar from Oslo. So, in a way you can say he was my boss.

Q. And continuing with Exhibit T, who are the two signatories to that letter, Mr. Tumanov and Mr. Kosogov?

A. The two board, the two directors in

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 Kyivstar board representing Storm. Mr. Tumanov was the chairman of Storm, and he was also the chairman of Kyivstar, and Mr. Tumanov was Alpha's representative in the Telenor, the Kyivstar board of directors.

Q. Following this letter sent by these two gentlemen to your colleagues in Oslo, did Telenor in fact agree to negotiate with Storm over Storm's request to change the draft shareholders' agreement?

A. They send an answer before Christmas stating that they're supporting my position that we should sign the agreement as it was, but they also said that they were willing to meet representative for Storm after Christmas when Mr. Gustad came to Kiev.

Q. Did there come a time when negotiations over Storm or Alpha's request to change the agreement actually began?

A. As this seemed to be very important for Storm, Telenor started negotiating on the -- negotiating, making changes in this termination agreement in approximately the 20th of January, something like that.

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Ekhougen/Direct-Sills
 ARBITRATOR CRAIG: Mr. Sills, could I ask a question about the --

MR. SILLS: Of course.

ARBITRATOR CRAIG: There is a reference about an attachment there which has the suggested amendments to the new shareholders' agreement that is attached to this letter from Tumanov and Kosogov.

THE WITNESS: Yes.

ARBITRATOR CRAIG: But there is no attachment here. Does that attachment appear somewhere else in that set of exhibits?

CHAIRMAN FEINBERG: Is that U and V?

ARBITRATOR CRAIG: I'm looking for sort of a list of the proposed amendments that, being discussed in these e-mails, and there was one I guess attached to this e-mail.

MR. SILLS: I don't know.

THE WITNESS: I have it here, if you have want it.

ARBITRATOR CRAIG: If it's in English.

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THE WITNESS: It's in English, I did not speak Ukraine.

MR. SILLS: It is, if we could take just a moment, we'll make copies and distribute them.

ARBITRATOR CRAIG: That would be great.

CHAIRMAN FEINBERG: Do you want to continue and then come back to the --

ARBITRATOR CRAIG: I just want to get them.

CHAIRMAN FEINBERG: Continue, Mr. Sills.

MR. SILLS: Thank you, Mr. Chairman.

Q. Directing your attention now to Exhibit V.

ARBITRATOR CRAIG: V as is Victor?

MR. SILLS: Yes.

Q. I apologize, Exhibit U, first. You have seen this document before?

A. Yes, I was copied on part of the document.

Q. Okay. And --

A. But this was kind of technical

1 Ekhougen/Direct-Sills
2 discussion about the wordings among lawyers.

3 MR. VAN TOL: Mr. Sills, may I just
4 interject? I'm sure this is the case, are
5 the redactions on U and other documents,
6 are those for privilege reasons?

7 MR. SILLS: No, those are simply the
8 headers when we printed them here, the
9 names of lawyers in our office appeared on
10 it and that's what been redacted.

11 MR. VAN TOL: Understood.

12 MR. SILLS: So it's more aesthetic
13 than a privilege matter.

14 MR. VAN TOL: Okay.

15 **Q. Who is the Aleksey Hudyakov referred**
16 **to in this document?**

17 A. Who is he?

18 **Q. Who is Mr. Hudyakov?**

19 A. Aleksey Hudyakov was authorized by
20 the two Storm directors in Kyivstar board to
21 negotiate these technical changes.

22 **Q. And who is the Oleksiy Didkovskiy**
23 **referred to here?**

24 A. Didkovskiy is our Ukrainian legal
25 advisor.

1 Ekhougen/Direct-Sills
2 meeting representing Storm, but not
3 officially representing, but as non-voting
4 participant in the meeting.

5 ARBITRATOR JENTES: All right.

6 MR. SILLS: Maybe I could just follow
7 that up.

8 **Q. Do you know or do you have an**
9 **understanding, Mr. Ekhougen, as to the**
10 **percentage ownership of Storm that various**
11 **companies in the Alpha group have in the**
12 **aggregate?**

13 A. At that time we were told that Alpha
14 group at 50.1 percent in Storm.

15 **Q. What percentage do they have today?**

16 A. Different companies in Alpha group
17 has 100 percent.

18 **Q. To your knowledge, does Storm conduct**
19 **any operations other than holding the shares of**
20 **the Kyivstar?**

21 A. No, holding the shares of Kyivstar
22 was the only operation.

23 ARBITRATOR JENTES: At the time you
24 were talking about when Alpha owned 50.1,
25 who owned the 49.9?

1 Ekhougen/Direct-Sills

2 ARBITRATOR CRAIG: Telenor's?

3 THE WITNESS: Telenor legal advisor.

4 Yes. And he is present here.

5 ARBITRATOR CRAIG: As far as you
6 know, this Mr. Hudyakov, was he a lawyer?

7 THE WITNESS: I don't know.

8 ARBITRATOR JENTES: But in any event,
9 he was in charge of handling the
10 negotiations as you understood it for the
11 Alpha group --

12 THE WITNESS: For Storm.

13 ARBITRATOR JENTES: For Storm.

14 Well, let me pursue my question
15 further.

16 I noticed in reaching these documents
17 that almost all the communications seemed
18 to be with Alpha or representatives of
19 Alpha. Who did you understand was
20 involved in the negotiations?

21 THE WITNESS: As I think I said, I
22 was told by the two Storm directors that I
23 should relate to Mr. Hudyakov. I also see
24 that his e-mail address is Alpha Bank, but
25 he participated in all Kyivstar board

1 Ekhougen/Direct-Sills

2 THE WITNESS: Some Ukraine owners,
3 the existing Ukraine owners of Storm.
4 Storm was a Ukrainian company when the
5 company was founded in '98. There is
6 also one attachment showing who the owners
7 are as part of the preparation for the
8 bond issue, but I don't know if that is
9 relevant.

10 ARBITRATOR JENTES: I think we will
11 get to that.

12 So what we have just been handed now
13 is the attachment that Mr. Craig had asked
14 for, that is the attachment to U, I guess
15 it's T.

16 MR. SILLS: I believe it's Exhibit T.

17 MR. VAN TOL: Rather than make it a
18 new exhibit, maybe we could deem it to be
19 part of Exhibit T.

20 **Q. Why don't we return that briefly.**
21 **Looking at the second portion of Exhibit T that**
22 **the parties and the panel now have, Mr.**
23 **Ekhougen, was this the proposal to amend the**
24 **shareholders' agreement made by Storm?**

25 A. Yes.

Ekhougen/Direct-Sills
Q. Did Telenor have any role in drafting this proposal?

A. No.

Q. Had Telenor suggested at any point that the shareholders' agreement should be amended or changed in any way?

A. No. On the contrary, we, as I wrote in my letter, this, we do not, we did not want any change. We would like to stick to the original agreement.

Q. Could you turn to Exhibit V, as in Victor.

Have you seen this document or these e-mails before?

A. Yes. I have been copied on some of them, and I have seen them.

I have been copied on all of them, actually.

Q. Were these documents sent between representatives of Storm and Telenor in the course of negotiating over Storm's proposed changes to the shareholders' agreement?

A. Yes, this was in a -- firstly, we checked that the last part of these were from

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Storm, but we said that we were willing to, to negotiate on material breach as a reason for a non-breaching shareholder to terminate the contract.

And this was sort of the legal discussion about what should be the limit, what should be the definition on material breach.

Q. And then looking at Exhibit W, have you seen this document before?

A. Yes. I was copied on that document.

Q. And does this document show all the changes between the shareholders' agreement attached to the voting agreement and the 2004 agreement as changed to reflect the terms requested by Storm?

A. Referring to the enclosed shareholders' agreement where these changes are marked.

ARBITRATOR CRAIG: We are at W here?

MR. SILLS: That's correct.

Q. Had any of the changes in there been requested by Telenor?

A. No. On the contrary.

Q. Look, if you would, at Exhibit X.

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ARBITRATOR JENTES: Before you leave that, if I look at the table of contents to W, does this tell me that the only change to anything other than the definitions are in Article 11?

MR. SILLS: Are you addressing the witness with that question?

ARBITRATOR JENTES: The witness, yes. If you know.

THE WITNESS: Here are these technical changes included already, so they are not marked as changes.

ARBITRATOR CRAIG: These are the ones related to Ericsson?

THE WITNESS: Yes, so we are here comparing with the proposal where we have proposed to sign in December, so this is the Alpha or the Storm proposal, to change this.

ARBITRATOR JENTES: What I am trying to get at is does this tell me that the only changes were in Article 11 on page 28 of the draft?

THE WITNESS: Yeah, and we also

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deleted then Article 808 as a consequence, because that related to the same issues.

ARBITRATOR JENTES: I see, so that is on the table of contents page, little i?

THE WITNESS: I am not sure.

ARBITRATOR JENTES: Okay, I'm sorry, you are not the lawyer, okay, all right.

ARBITRATOR CRAIG: It appears at the bottom of that page.

MR. SILLS: I think this has to do with the history and the way in which different word processors black line documents.

ARBITRATOR JENTES: I'm just wondering, I want to have a clear understanding in lieu of what was argued by Storm or presented by Storm earlier today, that the only changes other than the Ericsson changes are those that called for the deletion of 8.08, and the revisions to 11.01 and 11.02; is that it?

MR. VAN TOL: That's our understanding as well.

ARBITRATOR JENTES: Okay.

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1 Ekhougen/Direct-Sills
 2 MR. VAN TOL: If that helps.
 3 ARBITRATOR JENTES: Yes.

4 **Q. Look, if you would, at**
 5 **Exhibit X to the Telenor brief.**

6 A. This is the e-mail that I received
 7 from Hudyakov to me, where he confirms that they
 8 are prepared to sign and he proposes a procedure
 9 for signing.

10 The prolongation letter, I don't
 11 remember the correct name, where we were willing
 12 to extend the time for signing, said 31st of
 13 January as the last day, so that's why this
 14 meeting had to take place as scheduled here
 15 without Nilov participating.

16 **Q. Mr. Ekhougen, who had requested the**
 17 **execution to January 31st to sign the**
 18 **shareholders' agreement?**

19 A. Storm.

20 **Q. Look at tab Y, if you would.**

21 A. Yes. It's a copy of the
 22 shareholders' agreement signed on the 30th of
 23 January by me and the president of Kyivstar,
 24 Igor Lytovchenki.

25 We also have a copy of the same page

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1 Ekhougen/Direct-Sills

2 A. Yes.

3 **Q. At the time, at the time that this**
 4 **signed and sealed document was delivered, were**
 5 **any other documents delivered to Telenor in**
 6 **conjunction with the closing?**

7 A. Our legal advisor, Olkesiy
 8 Didkovskiy, got both the signature page and two
 9 documents from Storm signed by Yuri Tumanov, as
 10 chairman of Storm and Kosogov as board member or
 11 director representing Storm and Kyivstar.

12 **Q. Directing your attention to Exhibit**
 13 **AA, is that the certificate delivered by**
 14 **Mr. Tumanov?**

15 A. Yes, it is.

16 **Q. And directing your attention to**
 17 **Exhibit BB, BB, is that the certificate**
 18 **delivered by Mr. Kosogov?**

19 A. Yes.

20 **Q. At the time that the executed**
 21 **shareholders' agreement was delivered, did you**
 22 **have any doubt in your mind about Mr. Nilov's**
 23 **authority to sign it?**

24 A. No, no doubt whatsoever. We knew
 25 Nilov asked the general director of Storm, he

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1 Ekhougen/Direct-Sills
 2 with, that was sent to us the same day with
 3 Valeriy Nolov's signature. But here on this
 4 page that signature was added. This was a
 5 Friday, and he added the signature on Monday.

6 **Q. As suggested in Exhibit X, had**
 7 **Mr. Nilov previously supplied a fax signature in**
 8 **order to have the document executed on the 29th?**

9 A. Yes.

10 **Q. So, this exhibit that we are now**
 11 **looking at, was this the second time that**
 12 **Mr. Nilov had signed the document?**

13 A. Yes, he signed, he signed this last
 14 page on Friday, and then came to the lawyer's
 15 office on Monday, and signed this, this page.

16 **Q. And looking at the signature on the**
 17 **page, it appears that each party sealed the**
 18 **document as well?**

19 A. Very important in Ukraine.

20 **Q. Could you expand on that and explain**
 21 **why it's important in Ukraine?**

22 A. A signature is not binding without
 23 company stamp and it has to be round.

24 **Q. And you recognize the stamp of Storm**
 25 **on this document?**

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1 Ekhougen/Direct-Sills

2 had been signing all kinds of Storm documents
 3 earlier. I was told by our legal counselor that
 4 these documents we got was sufficient to accept
 5 his signature, and we also got the mail from
 6 Hudyakov describing the procedure.

7 If I would have been in any doubt I
 8 would not have signed this agreement, but it was
 9 undoubtedly from my point of view that this was,
 10 they were acting according to, to Storm's will.

11 **Q. Did Mr. Nilov say or do anything that**
 12 **would have caused you to question his authority?**

13 A. No. Mr. Nilov only speaks Ukrainian,
 14 so we always had to communicate through an
 15 interpreter, but I was not present in the office
 16 that Monday because I had to go home to Norway.

17 There was no reason to, as far as I
 18 know, nothing.

19 **Q. Did any of your colleagues at Telenor**
 20 **ever suggest to you that they had any concern or**
 21 **question regarding Mr. Nilov's authority?**

22 A. No.

23 **Q. Did anyone at Storm or Alpha, acting**
 24 **or purporting to act on Storm or Alpha's behalf**
 25 **ever say or do anything to you in 2004 that**

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suggested that there was any question about
Mr. Nilov's authority to execute this agreement?

A. On the contrary.

Q. Could you expand on that a bit?

A. I mean, we, we went on acting as this based on the shareholders' agreement. As I said earlier, first thing we had to do was to buy back some shares. The next step, we had to change the charter of the company because the new shareholders' agreement and the new number of shareholders and shareholding had to be reflected in the charter.

Actually, it was also set in Ukrainian legislation that made it necessary. So we started working on the new charter. The new charter was approved by the board of directors in Kyivstar, and Mr. Yuri Tumanov, the Chairman of Storm, proposed these changes in the charter to, at a general meeting of shareholders in April 2004.

At the same meeting, we also elected additional board members to Kyivstar, because according to the old charter, Kyivstar had 37 board members, two from Storm, one from Omega,

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and four from Telenor, the new board should consist of nine members, five from Telenor and four from Storm. And these four members were also elected on shareholders' meeting in April.

Actually, Mr. Hudiyakov as we mentioned earlier, was at that time elected member of the board of directors of Kyivstar.

Q. Look at DD to this brief, if you would.

A. Yeah, this, this is a copy of the shareholder meeting, I mentioned. I acted as the secretary of meeting, Mr. Nilov acted as a chairman of meeting, and as I said, Yuri Tumanov as chairman of Kyivstar also participated in the meeting, together with administration.

Q. And does this document record corporate action on the changes to the Storm charter required by the shareholders' agreement?

A. Sorry. I don't get your question.

Q. Does this document reflect action taken at a shareholders' meeting to chair the Kyivstar charter?

A. Yes.

ARBITRATOR CRAIG: Referring to DD?

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MR. SILLS: Yes.

A. We approved new charter.

Q. And were these changes required by the shareholders' agreement that had been signed in January?

A. Yes, some of them, some of the changes were a result, most of the changes were a result of the shareholders' agreement, but there were also some changes, because as I said, changes in Ukrainian legislation.

Q. Did Storm vote in favor of those changes?

A. Yes.

Q. Was there any suggestion at this meeting that the shareholders' agreement was in any way invalid or unauthorized?

A. None whatsoever.

Q. Mr. Ekhougen, what's the first time that you recall hearing that Storm or Alpha was challenging Mr. Nilov's authority to execute the shareholders' agreement?

A. Sometime during the spring, 2005. We were notified that Storm has filed a motion to Ukrainian court claiming that it was not valid

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because it was some breach of Ukrainian legislation.

Q. When you say you were notified --

ARBITRATOR JENTES: I'm sorry. Did you misspeak? I think it's recorded as 2005.

THE WITNESS: Yes, 2005. Am I wrong?

Q. Let me direct your attention to Exhibit EE. It's the very last exhibit to the, the very last exhibit to the Telenor brief.

A. EE.

Q. Do you see it's a press release on Altimo letterhead?

A. That's about the shareholders' agreement, but Alpha filed a claim in March 2005 that was later withdrawn.

Q. Mr. Ekhougen, do you know if that claim involved any assertion that Mr. Nilov lacked authority as opposed to the fact that the contract was allegedly not written in Ukrainian?

A. No.

Q. Okay. What's the first time that you recall hearing that a claim was being raised that Mr. Nilov lacked authority to execute the

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shareholders' agreement?

A. That was in May 2006, where we were, we got a call from Telenor. Telenor got a call from some Russian journalist that had a Russian press release stating this fact, that Nilov was not authorized. We got it translated and then later, some days later we found the same press release on Alpha's internet page, but we never got it directly from Alpha or from Storm.

Q. And did there come a time when Alpha's or Storm's representatives stopped attending board of directors' meetings for Kyivstar?

A. Last time they attended a board of directors' meeting was in December 2004.

Q. So, throughout 2005, they ceased attending board of directors' meetings?

A. Yes.

Q. Throughout 2005, did anyone from Alpha say or suggest that the reason its representatives were not attending board meetings as required by the shareholders' agreement was that Mr. Nilov had not been authorized to sign the shareholders' agreement?

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A. No.

MR. SILLS: Thank you very much, Mr. Ekhouden. That's all I have on direct examination.

CHAIRMAN FEINBERG: Mr. Ekhouden, what is your opinion as to why there was an attempt to terminate the shareholders' agreement?

THE WITNESS: Why?

CHAIRMAN FEINBERG: It was under your testimony binding and official, why, what was the motivation to terminate the agreement?

THE WITNESS: I think we have, we are actually very difficult to understand why Storm are acting like they are doing, but it seems like they, I mean, what we have seen afterward, they want to have equal rights or equal standing in Kyivstar even if they have only 43 percent of the shares.

CHAIRMAN FEINBERG: What is the business motivation as to why they want that?

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THE WITNESS: I don't know.

CHAIRMAN FEINBERG: When you have learned, when you learned in 2006 of the argument being made by Storm, did you or any of your colleagues attempt to get a business explanation from Storm as to why they were doing this?

THE WITNESS: We have never got a good explanation why they have never participated in the shareholders' meeting and the board meeting. We have never gotten an explain for why they wanted to terminate the shareholders' agreement.

CHAIRMAN FEINBERG: Did you attempt to find out?

THE WITNESS: I did not, but I mean, there are communication between Telenor and Storm Alpha on other levels than mine, but I am not able to answer for what they did, but there are contact or communication.

CHAIRMAN FEINBERG: Do my colleagues have any questions? Otherwise we can take a brief break before the

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cross-examination.

ARBITRATOR JENTES: I have a couple of questions just to tie down things, if I may.

If I look back at, I guess it's Exhibit Y, which is, as I understand it, the executed copy of the shareholders' agreement of January 30th, 2004.

Am I correct that the only changes that were made in that shareholders' agreement versus the draft that had been proposed, I guess back in 2002, was the technical changes as you have referred to having to do with Ericsson, and the deletion of 8.08 and Article 11's changes?

THE WITNESS: Yes.

ARBITRATOR JENTES: In particular, was there ever any discussion that you were a party to that called for or suggested on the part of Storm that there be some changes in the dispute resolution provisions that are in Article 12.01 that starts on page 30?

THE WITNESS: No, these termination

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1 Ekhougen/Direct-Sills
 2 clause were the only thing that was
 3 mentioned and as you -- as shown in this
 4 letter from Storm or this amendment.
 5 ARBITRATOR JENTES: And again, just
 6 so I am clear, if you look over on page
 7 34, there are some provisions regarding
 8 governing law being the State of New York
 9 and in Section 13.06, and a provision
 10 relating to severability in 13.07.
 11 To your knowledge, was there ever any
 12 suggestion by Storm that there needed to
 13 be or should be some changes in those two
 14 provisions?
 15 THE WITNESS: No.
 16 ARBITRATOR JENTES: If you look over
 17 at page 43, about a third of the way down,
 18 there is a listing of the beneficial
 19 owners and description of ownership
 20 interest in Storm. What's happened to
 21 that beneficial ownership as far as you
 22 know?
 23 In other words, to be precise, there
 24 is references to a variety of companies
 25 here who don't seem to be around anymore,

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1 Ekhougen/Direct-Sills
 2 THE WITNESS: One of the owners of
 3 Altimo, as far as I know, but now I am
 4 talking, I have seen no documentation of
 5 what you are asking me about now, so this
 6 is my impression.
 7 ARBITRATOR JENTES: So as far as your
 8 understanding is concerned, after the
 9 shareholders' agreement was executed in
 10 January of 2004, there was a transfer of
 11 the beneficial ownership in Storm to these
 12 other Alpha entities, is that your
 13 understanding?
 14 THE WITNESS: Yes. I -- still I
 15 think -- I know it was toward the end of
 16 2004 or early in 2005, but I -- I expect
 17 that counselor for Storm has the exact
 18 date. We have not, I have never seen any
 19 sort of confirmation of that.
 20 MR. SILLS: Mr. Jentes, I don't mean
 21 to interrupt, if you look at Exhibit H to
 22 Mr. Rabij's affidavit, taken from various
 23 official documents in Ukraine, there is a
 24 description of the ownership chain and the
 25 ownership changes in Storm, and two

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1 Ekhougen/Direct-Sills
 2 what happened to them, if you know?
 3 THE WITNESS: As far as we are told,
 4 not official here but indirectly from
 5 Storm, an Alpha company, could I ask for
 6 help? Acord, was that the name?
 7 An Alpha company bought the shares of
 8 these three companies, represented
 9 49.39 percent of the shareholders.
 10 ARBITRATOR JENTES: Well, again, I am
 11 only looking as to what you know or have
 12 been told.
 13 Currently, there is a reference to
 14 Altimo being the parent of Storm. Do you
 15 understand that to be the case?
 16 THE WITNESS: Altimo, as far as I
 17 understand, is sort of just a renaming of
 18 Telecom.
 19 ARBITRATOR JENTES: And Altimo, to
 20 your understanding, is that owned by Alpha
 21 Group?
 22 THE WITNESS: Yes. It's 100 percent
 23 controlled by Alpha Group.
 24 ARBITRATOR JENTES: Where does
 25 Alperin fit into this, as far as you know?

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1 Ekhougen/Direct-Sills
 2 different Alpha entities control
 3 100 percent of the interest in Storm,
 4 according to the amendment number three to
 5 the charter. It is a portion of Exhibit H
 6 to Mr. Rabij's affidavit, I can show you
 7 here, if you like.
 8 ARBITRATOR JENTES: It's in H?
 9 MR. SILLS: Yes, sir, here it is.
 10 ARBITRATOR JENTES: What's the page
 11 number?
 12 MR. SILLS: The pages are not
 13 numbered sequentially. It lists the two
 14 participants as Alpha and Alperin. I
 15 don't think this is a matter in dispute,
 16 that it's 100 percent subsidiary of the
 17 Alpha Group consortium owned through that
 18 series of intermediary companies
 19 organized, I believe, in Cyprus and
 20 Gibraltar.
 21 MR. VAN TOL: There is only an
 22 objection. There is no legal entity the
 23 Alpha Group Consortium. I don't think
 24 that is something to be debated here.
 25 ARBITRATOR JENTES: What I am really

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1 Ekhougen/Direct-Sills
2 trying to tie down for my own purposes,
3 when did the claimant in the case that was
4 decided in April of this year, acquire its
5 shares and from whom? Do we know that?

6 MR. VAN TOL: I will find that out
7 for you. When did Alperin --

8 ARBITRATOR JENTES: What I am just
9 interested in, were they a bona fide
10 purchaser? Were they a successor in
11 interest? What are their rights? How did
12 they get their rights and what are they, I
13 guess is what I am a little bit interested
14 in.

15 MR. VAN TOL: We will find that out
16 for you.

17 MR. SILLS: I believe, Mr. Jentes,
18 this exhibit to Mr. Rabi's affidavit
19 addresses that, because of the requirement
20 that amendments to corporate documents be
21 officially filed in Ukraine, this is dated
22 September 3, 2004, and it records Alperin
23 as a participant for the first time.

24 ARBITRATOR JENTES: Okay. Last
25 question. When was the last time you had

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1 Ekhougen/Direct-Sills
2 any dealings Mr. Nilov, roughly?

3 THE WITNESS: I'm not sure. We met
4 him, I met him in the shareholder meeting
5 in April 2004. I do not think I met him
6 after that.

7 ARBITRATOR JENTES: So you didn't
8 have dealings with him after that?

9 THE WITNESS: No.

10 ARBITRATOR JENTES: According to
11 other evidence in here, he was replaced
12 someplace along the line by Mr. Klymenko?

13 THE WITNESS: That is quite recently.
14 I'm not sure when.

15 ARBITRATOR JENTES: Thank you.

16 CHAIRMAN FEINBERG: Mr. Craig.

17 ARBITRATOR CRAIG: I do have a couple
18 of questions.

19 Going back to Exhibit Q, if you
20 would, please. This is an e-mail. There
21 are two e-mails in this exhibit, but the
22 e-mail from Mr. Hudiyakov to you states
23 that, and Khudyakov at this point is
24 speaking for Alpha Bank and for Storm's
25 interests?

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1 Ekhougen/Direct-Sills
2 THE WITNESS: I understand he's
3 speaking for Storm.

4 ARBITRATOR CRAIG: For Storm, okay,
5 the address says Alpha Bank, but you have
6 understood that Khudyakov at that point was
7 speaking for Storm, correct?

8 THE WITNESS: Yes.

9 ARBITRATOR CRAIG: And he says in
10 that e-mail dated November 12, 2003, that,
11 "Our firm position," I'm quoting here, "is
12 that we do not want any further
13 negotiations over the agreement and should
14 sign the text that was agreed last year
15 with small technical changes reflecting
16 the Ericsson debt."

17 So it was your understanding, am I
18 correct, that as of November 12, 2003,
19 Storm did not want to change anything
20 significantly in the shareholders'
21 agreement?

22 THE WITNESS: That's correct.

23 ARBITRATOR CRAIG: But that position
24 changed in the following month?

25 THE WITNESS: Yeah.

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1 Ekhougen/Direct-Sills

2 ARBITRATOR CRAIG: And that prompted
3 your letter of December 17th?

4 THE WITNESS: Yes.

5 ARBITRATOR CRAIG: Saying we want to
6 go with the old shareholders' agreement;
7 is that right?

8 THE WITNESS: Yes.

9 ARBITRATOR CRAIG: Do you know why
10 their position changed?

11 THE WITNESS: No.

12 ARBITRATOR CRAIG: Did you ever ask
13 anybody as to the reason for the change of
14 position?

15 THE WITNESS: We, I personally have
16 never got a good explanation why it
17 changed. I'm not willing to speculate why
18 they wanted it.

19 ARBITRATOR CRAIG: You opposed the
20 change of language or substance in the
21 earlier shareholders' agreement, did you
22 not?

23 THE WITNESS: Yes.

24 ARBITRATOR CRAIG: Why was that?

25 THE WITNESS: Because, I mean -- I'm

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1 Ekhougen/Direct-Sills
2 referring to this e-mail, and I'm
3 referring to the wording of the voting
4 agreement where we had already agreed that
5 we should sign this proposal shareholders'
6 agreement.

7 ARBITRATOR CRAIG: Understood.

8 But Storm apparently changed its
9 position, and wanted to make
10 modifications; is that correct?

11 THE WITNESS: Yes, but --

12 ARBITRATOR CRAIG: Your position was
13 opposed to that. You did not want to make
14 changes, correct?

15 THE WITNESS: I did not agree that we
16 should make changes at that stage. I said
17 also in the e-mail that if they don't like
18 to make changes, we were willing to meet
19 them afterward and discuss further
20 development.

21 At that time, we had three days to
22 sign the shareholders' agreement we had
23 discussed during the autumn, and they have
24 conformed that they will. I saw no reason
25 we should suddenly start to negotiate.

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1 Ekhougen/Direct-Sills
2 changes and especially changes that I
3 think was not really relevant to the
4 business part of this.

5 I mean, the shareholders' agreement,
6 the main idea is to sort of regulate the
7 cooperation between the shareholders,
8 establish a corporate governance and try
9 to increase shareholder value on the
10 common platform.

11 These changes that were introduced
12 might be important from a legal
13 perspective. From a business perspective
14 they were, as far as I can see, not
15 relevant.

16 ARBITRATOR CRAIG: Now, there came a
17 time when Telenor changed its position, is
18 that right, on the issue of negotiating
19 these changes?

20 THE WITNESS: As you see from this
21 letter from Tumanov and Kosogov, they are
22 referring to the good partnership and
23 urged Telenor Mobile to be willing to
24 start negotiating, and that made a kind of
25 impression on Telenor, on my bosses in

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1 Ekhougen/Direct-Sills
2 ARBITRATOR CRAIG: Were you speaking
3 for Telenor?

4 THE WITNESS: I was speaking for
5 Telenor. This was confirmed by my boss in
6 Oslo. They urge Telenor to negotiate and
7 referred to good partnership and things
8 like that.

9 ARBITRATOR CRAIG: Now, when you look
10 at the position in opposition to the Storm
11 proposed amendments, were you in
12 communication with your bosses back in
13 Oslo?

14 THE WITNESS: Yes.

15 ARBITRATOR CRAIG: Did they tell you
16 that was Telenor's position to oppose
17 those changes?

18 THE WITNESS: Yes.

19 ARBITRATOR CRAIG: And why was that?

20 THE WITNESS: As I said, we had
21 agreed in the voting agreement that the
22 shareholder agreement should be signed as
23 such, and this has been sort of the
24 position the whole autumn. So, we did not
25 understand why suddenly we should go in to

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1 Ekhougen/Direct-Sills
2 Oslo that they should open for discussion.

3 ARBITRATOR CRAIG: And Telenor
4 changed its position on the issue of
5 negotiating changes in the shareholders'
6 agreement?

7 THE WITNESS: As I said, we were
8 urged, and I mean if you read the letter,
9 they are saying they have ruined the good
10 partnership between Telenor and Alpha by
11 taking my position.

12 ARBITRATOR CRAIG: Understood. They
13 proposed enclosing the amendments that
14 they would like to see incorporated into
15 the shareholders' agreement.

16 THE WITNESS: That was actually, that
17 was known, that was sent to me before I
18 sent the letter.

19 ARBITRATOR CRAIG: I see, okay.

20 Was the substance of the proposed
21 amendments considered by Telenor and
22 rejected as part of the reason for not
23 agreeing to the amendments?

24 THE WITNESS: It was rejected by me
25 in my letter and it was also rejected when

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1 Ekhougen/Direct-Sills
2 my boss send the letter. I don't remember
3 the number, but there was a letter sent
4 just before Christmas.

5 ARBITRATOR CRAIG: Was there
6 something about the amounts that Telenor
7 disliked in terms of the context or
8 rejected?

9 THE WITNESS: I mean, as I said, they
10 had, Telenor had the same position as me.
11 We could not see why we were in 12 hours
12 start to renegotiate an agreement that
13 everyone has confirmed that we agreed to.

14 ARBITRATOR CRAIG: I would like to
15 compare the proposed amendments that is
16 part of the -- with what ultimately ended
17 up in the new shareholders' agreement.

18 Were there changes made as a result
19 of negotiations between Storm and Telenor
20 in the proposed amendments?

21 THE WITNESS: Yes, there are two,
22 they are actually proposing two changes
23 but we ended up with one change regarding
24 the condition for a material breach.

25 ARBITRATOR CRAIG: But their

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1 Ekhougen/Direct-Sills
2 change, how it ended up.

3 I take that back.

4 THE WITNESS: I didn't quite get you.

5 ARBITRATOR CRAIG: I don't blame you.
6 The shareholders' agreement that was
7 attached to the voting agreement was one
8 draft, and then the final shareholders'
9 agreement that was signed in 2004 resulted
10 in some changes relating to material
11 breach, correct, is that right?

12 THE WITNESS: Yes.

13 ARBITRATOR CRAIG: Can you describe
14 for us the nature of the change between
15 the 2002 draft and the final draft? Did
16 the 2002 draft deal with material breach?

17 THE WITNESS: No. You have to excuse
18 me not to be a lawyer, so, probably we
19 should all be lawyers. To my thinking the
20 reason for terminating the contract in the
21 original proposal was that it was
22 something criminal, some corruption
23 involved between the shareholders and the
24 company.

25 This material breach as an argument

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1 Ekhougen/Direct-Sills
2 proposal, if you look at it in the -- is
3 not exactly what ends up in the final
4 shareholders' agreement, is there --

5 THE WITNESS: No. There was a
6 negotiation.

7 ARBITRATOR CRAIG: There was a
8 negotiation.

9 Were you responsible for negotiating
10 on behalf of Telenor for that?

11 THE WITNESS: We agreed at one stage
12 that we were willing to agree on the term
13 material breach, then sort of it was more
14 or less a discussion between the lawyers,
15 what sort of is the definition of the
16 material breach.

17 Then we have also, we went into the
18 discussion where it comes to the size of
19 material breach, we discussed last
20 figures, I was part of that discussion,
21 yes.

22 ARBITRATOR CRAIG: Can you explain to
23 us today, what change, what the change was
24 in the shareholders' agreement before the
25 negotiation and what, just describe the

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1 Ekhougen/Cross-
2 for termination was new and introduced as
3 a result of this, this urgent request from
4 Alpha.

5 CHAIRMAN FEINBERG: Anything else,
6 Greg?

7 ARBITRATOR CRAIG: That's it.

8 CHAIRMAN FEINBERG: May I suggest
9 this? May we take a 15-minute break, and
10 then, Pieter, you will have a chance to
11 cross-examine.

12 How long will your cross-examination
13 go, Pieter? Do you have an idea?

14 MR. VAN TOL: About half hour, am
15 hoping.

16 CHAIRMAN FEINBERG: The goal will be
17 to complete the witness and over lunch to
18 prepare your arguments on the law with the
19 panel.

20 So why don't we break and reconvene
21 in 15 minutes at 11:10.

22 (Recess taken.)

23 CHAIRMAN FEINBERG: Let's reconvene.
24 Pieter, you have the floor for the
25 cross.

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1 Ekhougen/Cross-Van Tol
 2 MR. VAN TOL: Thank you,
 3 Mr. Chairman.
 4 CROSS-EXAMINATION
 5 BY MR. VAN TOL:

6 **Q. Good morning, Mr. Ekhougen.**

7 A. Good morning.

8 **Q. I would like to take you back to the**
 9 **time when you took over responsibility for the**
 10 **Kyivstar management.**

11 **I believe you testified that you**
 12 **reviewed a copy of the voting agreement; is that**
 13 **correct?**

14 A. I tried to get acquainted with all
 15 relevant documents that was in the office, and
 16 that was definitely one of those.

17 **Q. And the other document you mentioned**
 18 **was a shareholders' agreement that was attached**
 19 **to it, correct?**

20 A. Yep.

21 **Q. Now, did you also take a look at the**
 22 **documents that were sent by Storm in connection**
 23 **with the voting agreement transaction in 2002?**

24 A. No.

25 **Q. Were you aware that Mr. Nilov had**

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1 **Ekhougen/Cross-Van Tol**
 2 **sent, among other things, resolutions regarding**
 3 **the voting agreement?**

4 A. What does that exactly mean?

5 **Q. Let me show you a document, that**
 6 **might help. In fact, I need to give you, I'm**
 7 **going to give you a binder of documents. And**
 8 **with one exception, these are documents that are**
 9 **attached to Telenor Mobile's briefs, so I will**
 10 **refer to them as such as I go along.**

11 **If you could, could you turn to**
 12 **Exhibit L?**

13 ARBITRATOR JENTES: This is the same
 14 L that we have been looking at this
 15 morning?

16 MR. VAN TOL: That's right. Exhibit
 17 L to Telenor Mobile's brief.

18 A. I'm not a lawyer, and as a lawyer I
 19 relate to my legal advisor when it comes to
 20 going through these kind of documents. I don't
 21 think I saw this document at that time.

22 **Q. Do you have any reason to doubt that**
 23 **these documents were received by Telenor Mobile**
 24 **in connection with the 2002 voting agreement**
 25 **transaction?**

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1 **Ekhougen/Cross-Van Tol**
 2 A. No.
 3 ARBITRATOR CRAIG: Are we looking at
 4 the same document?

5 MR. VAN TOL: Exhibit L.

6 A. This is a document from Storm, isn't
 7 it?

8 ARBITRATOR JENTES: This is
 9 certificate of the senior officer of the
 10 purchaser?

11 MR. VAN TOL: That's correct.

12 **Q. Are you aware that Mr. Hansen has**
 13 **testified that Exhibit L was received by Tom in**
 14 **October 2002?**

15 A. No. As I said, I was not part of
 16 this business unit at all at that time.

17 **Q. Well, I take it you don't have any**
 18 **reason to doubt Mr. Hansen's sworn testimony --**

19 A. No.

20 **Q. -- that these documents were**
 21 **received?**

22 A. No, no.

23 **Q. So we have established that it was**
 24 **received by Telenor Mobile in October 2002,**
 25 **right?**

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1 **Ekhougen/Cross-Van Tol**

2 A. Are you questioning me about
 3 Mr. Hansen's testimony? As I said, I was not
 4 there when this was received. I see it is here,
 5 and I see it is in our binder, so I have no
 6 reason to believe it was not received.

7 **Q. Okay. Could you turn to the second**
 8 **page of Exhibit L, and you will see that one of**
 9 **the things that --**

10 A. The second page is in Ukrainian.

11 **Q. Not the third page, the second page.**
 12 **Do you see up at the top it says,**
 13 **"Storm's restated charter as proposed on**
 14 **June 26th, 2002"?**

15 A. Um-hum.

16 **Q. And as you said, what follows is**
 17 **Ukrainian.**

18 **Now, I have supplied you in that**
 19 **binder at tab 11 and you will note it's the tab**
 20 **on the bottom?**

21 A. Where?

22 **Q. If you don't mind, I'm going to come**
 23 **around and show you -- maybe Mr. Sills can.**

24 **Tab 11 for the tribunal benefit was**
 25 **attached to the Marta Khomyak affidavit and what**

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1 **Ekhouden/Cross-Van Tol**
2 **it is a translation of Storm's charter.**
3 A. I never seen that.
4 MR. SILLS: Could you bear with us at
5 a moment while we all get out this other
6 document, Mr. Van Tol?
7 ARBITRATOR JENTES: You said it's 11?
8 MR. VAN TOL: 11, yes.
9 MR. SILLS: Do you have an extra
10 copy, Mr. Van Tol? Those are our papers.
11 THE WITNESS: They don't include the
12 Storm papers.
13 ARBITRATOR JENTES: Oh, I didn't know
14 that.
15 (Interruption in proceedings.)
16 BY MR. VAN TOL:
17 **Q. Before we get to that, Mr. Ekhouden,**
18 **I would like to take you back to the front page**
19 **of Exhibit L that we have been looking at.**
20 **You will see there is a, you will see**
21 **there is a sub paragraph E at the bottom and it**
22 **says that Mr. Nilov is attaching English**
23 **translations of unanimous written consent of the**
24 **participants of the purchaser.**
25 **Do you see that?**

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1 Ekhouden/Cross-Van Tol
2 MR. VAN TOL: We are in L.
3 (Discussion held off the record.)
4 MR. VAN TOL: I'm sorry. These
5 documents aren't Bates stamp numbered.
6 **Q. Have you seen these resolutions**
7 **before today, Mr. Ekhouden?**
8 A. No.
9 **Q. Do you have any reason to doubt that**
10 **Telenor Mobile received them?**
11 A. No, if it's in Mr. Hansen's
12 testimony, I don't have any reason to believe
13 it's not true.
14 **Q. Do you know why Mr. Nilov sent**
15 **resolutions regarding the voting agreement to**
16 **Telenor Mobile in 2002?**
17 A. No. As I said, I was not part of
18 this unit at that time.
19 **Q. Do you know if the resolution is**
20 **required by Storm's charter?**
21 A. No, I do not.
22 **Q. Have you ever checked to find out**
23 **whether the resolutions were required by Storm's**
24 **charter?**
25 A. As I have said earlier, I am not a

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1 **Ekhouden/Cross-Van Tol**
2 A. Yes.
3 **Q. If you turn to that -- in that same**
4 **exhibit, if you turn to the second tab where I**
5 **have got a Post-It for you there, that second**
6 **Post-It?**
7 ARBITRATOR JENTES: For the panel,
8 where is that?
9 MR. VAN TOL: That's a very good
10 question. It's about --
11 ARBITRATOR JENTES: What is it?
12 MR. VAN TOL: I'm about to establish.
13 That is the resolutions from August 30th,
14 2002, relating to the voting agreement
15 transaction; right?
16 THE WITNESS: As far as I can see,
17 it's in Ukrainian.
18 **Q. Do you see the -- keep going. There**
19 **is an English translation behind that?**
20 A. Yes.
21 **Q. Have you seen those before today?**
22 A. No.
23 **Q. The only way I can describe it is --**
24 ARBITRATOR CRAIG: Let me see the
25 front page.

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1 Ekhouden/Cross-Van Tol
2 lawyer, I am a businessman. When I need legal
3 advice I ask my legal advisor if this and this
4 is okay.
5 **Q. Are you confident that someone in the**
6 **legal department at Telenor Mobile or some other**
7 **legal advisor has looked at the Storm charter at**
8 **some point in time?**
9 A. If it was a part of this closing in
10 2002, I am quite confident that I looked at it.
11 **Q. Now, staying with the resolutions,**
12 **the same page you are on, if you could look at**
13 **page two of the resolutions, there is a sub**
14 **paragraph C. Do you see that?**
15 It starts with the words, "The
16 execution, delivery and performance by the
17 company of the voting agreement."
18 **Do you see that paragraph?**
19 A. Yes.
20 **Q. It goes on to say that the voting**
21 **agreement has to do with the voting disposition**
22 **of shares in Kyivstar, correct?**
23 If you turn the page to page three,
24 there is a sub paragraph H. Do you see that?
25 A. Um-hum.

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Ekhougen/Cross-Van Tol
Q. That refers to the shareholders' agreement, the draft of which is attached to the voting agreement, correct?

A. Yeah, if you say so, yes.

Q. And then it goes on to say that that has to also do with the voting and disposition of shares in Kyivstar; right?

A. Yes.

Q. Okay. So, we have established so far that the voting agreement and whatever shareholders' agreement that is going to be entered into later has to do with the disposition of shares in Kyivstar; right?

A. Not surprisingly, yes.

Q. Now, I'm sorry to take you down that trail, but I want to return now to the translation of the charter, which is that Exhibit 11 to the Khomyak affidavit. I hope everyone is there, and I would like to draw your attention to Section 12.4 of the charter.

Let me know, please, when you are at Section 12.4. Are you there?

A. Yes.

Q. It carries over from one page to the

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Ekhougen/Cross-Van Tol
You will see that the disposal of Kyivstar shares is one of the things under 12.4 that requires a meeting of participants, right?

A. It says so, yes.

Q. So, now that we have seen that the voting agreement from 2002 has to do with the acquisition of Kyivstar's shares, we see the new shareholder agreement has to do with the acquisition of the Kyivstar shares, is it your understanding that the reason Mr. Nilov got resolutions in October 2002 was because of this requirement in Section 12.4?

A. I'm not able to answer that.

MR. SILLS: I'm going to object, Mr. Chairman, on two separate grounds. I don't see how this witness can possibly testify even as a matter of speculation as to Mr. Nilov's motive or supplying or not supplying some particular document, especially when the witness has testified he wasn't involved with corporate governance or Telenor operation in the Ukraine at the time.

Second, I think this is so far

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Ekhougen/Cross-Van Tol
next. It's only three paragraphs.

Could you just please take a moment to read that to yourself and let me know when you are finished and I will ask you a question.

A. Yes.

Q. You will see, I want to draw your attention to Section 12.42, which is two little iis, do you see that it starts with the words, disposal or encumbrance upon the Kyivstar shares?

A. What does "encumbrance" mean?

Q. An encumbrance is something, a legal obligation on something else. Do you see that? I'm not going to focus on that, I'm going to focus on the disposal of the shares, if that helps.

Do you see that?

A. I see the word, but as I said, I'm not a lawyer, and if I should sort of prepare to answer on details in a legal document I have not seen I would ask my legal advisors to tell me what it says.

Q. You can give me whatever answer you like to my questions, that's fine.

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Ekhougen/Cross-Van Tol
 outside the scope of direct, this is an attempt to cross-examine a lay witness on what appears to be a point of Ukrainian law.

CHAIRMAN FEINBERG: It goes to weight.

Go ahead.

MR. VAN TOL: Thank you.

I'm so -- could you read back his response?

(Record read.)

Q. Did you know any other reason why Mr. Nilov obtained the resolutions in October 2002?

A. I think you should ask Mr. Nilov that question.

Q. You are here, so I am asking your understanding.

Let's move on to, I believe you testified on direct that the entry into the new shareholders' agreement was dependent on the Omega share purchase; is that right?

A. Yes.

Q. So, if Storm or Alpha or some other

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Ekhougen/Cross-Van Tol
entity did not purchase the Omega shares, the new shareholders' agreement wouldn't come into existence; is that right?

A. That's correct. How I understand it.

Q. And, for example, Omega could have refused to sell its shares; is that right?

A. Yes, of course.

Q. And there never would have been a shareholders' agreement; right?

A. As we said earlier, I said earlier, we were not able to get out of this, the '98 shareholder agreement because of Omega was not a participate.

Q. But the Omega purchase of the shares was the condition for the entry into a new shareholders' agreement; right?

A. Yes. As far as I understand.

Q. Now, you have testified already about some negotiations regarding the 2004 shareholders' agreement. I would like to go back over quickly some of the documents to make sure we have got everything straight.

I would like to start with Exhibit Q, that is Exhibit Q to the Telenor Mobile brief,

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Ekhougen/Cross-Van Tol
and I want to draw your attention to your e-mail of November 4th, 2003, the bottom e-mail.

Do you see in the last paragraph you state that you have all the necessary POAs to sign both agreements.

What did you mean there when you said POA?

A. If have power of attorney from the chairman of Telenor Mobile to sign.

Q. Now --

A. And I think that is also one of the, the amendment to these documents.

Q. Now, to your understanding, was there a separate power of attorney for a Telenor Mobile representative in connection with the execution of the 2002 voting agreement?

A. 2002 agreement?

Q. Yes.

A. I don't know anything about that. I mean, I'm talking about the 2004 shareholders' agreement, and you have find it in the exhibit set, my power of attorney.

Q. We will get to that.

Let me tell you what your lawyers say

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Ekhougen/Cross-Van Tol
in the brief. October 2002, Telenor Mobile delivered, among other things, a power of attorney.

Do you have any reason to doubt the veracity of that? It's true, isn't it, that there was a power of attorney?

CHAIRMAN FEINBERG: If you know.

A. I was not a part of this. I was in Russia at that time.

ARBITRATOR JENTES: Could I help the witness?

When he asks you a question and you just don't know, don't be afraid to say, "I don't know." That ends the matter.

THE WITNESS: Yes. I don't know because I was not there.

CHAIRMAN FEINBERG: "I don't know," period.

ARBITRATOR JENTES: "I don't know," period.

BY MR. VAN TOL:

Q. So, you have no knowledge one way or the other of whether there was a power of attorney?

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A. No.

Q. Why did you obtain a power of attorney in or around November 2003?

A. Because we got the message from Mr. Kodelko that they were prepared to sign.

Q. To sign the new shareholders' agreement?

A. The new shareholders' agreement, yes.

Q. Assume for a minute that there was a power of attorney for Telenor Mobile from October 2002. I want you to assume that. I know you don't know, just assume it.

Someone at Telenor Mobile thought it was necessary for you to get a new power of attorney in the fall of 2003 to execute the new shareholders' agreement; right?

A. Yes.

Q. Okay. Without telling me, who told you that?

A. I suppose I was told that by a legal advisor. I got it from my boss in Oslo.

ARBITRATOR CRAIG: You got it from your boss in --

THE WITNESS: In Oslo.

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1 Ekhougen/Cross-Van Tol
 2 **Q. Let's turn, because you mentioned it,**
 3 **let's turn to Exhibit Z to the claimant's brief.**
 4 **Now, that's the power of attorney**
 5 **that you are referring to in Exhibit Q; right?**
 6 A. Yes.
 7 **Q. And you will see at the bottom that**
 8 **the power of attorney was issued on October 27th**
 9 **and was in effect until February 1st, 2004;**
 10 **right?**
 11 A. That's correct.
 12 **Q. So, this power of attorney is not**
 13 **unlimited, it doesn't give you powers to the end**
 14 **of time; right?**
 15 A. No.
 16 **Q. And it was due to expire just a day**
 17 **or so before the shareholders' agreement was**
 18 **signed, correct?**
 19 A. Yes.
 20 ARBITRATOR CRAIG: Before.
 21 MR. VAN TOL: I said a day or so
 22 before.
 23 **Q. I'm sorry. It was due to expire a**
 24 **day or so before the shareholders' agreement was**
 25 **signed?**

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1 Ekhougen/Cross-Van Tol
 2 **negotiate with Storm over the terms of the**
 3 **shareholders' agreement; correct?**
 4 A. That's correct.
 5 **Q. After your -- left me back up.**
 6 **Turn, if you would, please, to**
 7 **Exhibit R, and the next to the last paragraph of**
 8 **your e-mail you say that Telenor is willing to**
 9 **follow the agreed arrangements and execute the**
 10 **new shareholders' agreement in line with the**
 11 **draft that was attached to the voting agreement;**
 12 **right?**
 13 A. Yes.
 14 **Q. Then you go on to say, "This does not**
 15 **mean that you are unwilling to consider any**
 16 **amendments"; right?**
 17 A. At the late stage, I said yes.
 18 **Q. So as of December 16th, 2003, Telenor**
 19 **Mobile was willing to entertain amendments to**
 20 **the shareholders' agreement?**
 21 A. What I said was that in the eleventh
 22 hour, we were not willing to open for new
 23 negotiation, we would like to sign according to
 24 the agreement, but, of course, we are willing at
 25 any time to negotiate a shareholders' agreement.

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1 Ekhougen/Cross-Van Tol
 2 A. No, after. It expires after.
 3 **Q. Thank you. You asked a better**
 4 **question than I did.**
 5 A. Sorry, thank you.
 6 ARBITRATOR CRAIG: January 30th is
 7 the date?
 8 MR. VAN TOL: I think everyone gets
 9 the point even if I don't.
 10 **Q. Now, is it typical at Telenor Mobile**
 11 **that powers of attorney as in this case will be**
 12 **of limited time duration?**
 13 CHAIRMAN FEINBERG: If you know.
 14 A. I don't know what is the practice.
 15 **Q. Okay. Have you ever gotten a power**
 16 **of attorney at Telenor Mobile that was without a**
 17 **time limitation?**
 18 A. No. I have got for one year. I got
 19 for two years, but not without limitation.
 20 **Q. Now, you have testified earlier that**
 21 **your initial reaction to the suggested changes**
 22 **from Storm was to say no changes; right?**
 23 A. I said no changes.
 24 **Q. Okay. And at some point, though, you**
 25 **were told by your superiors to go in and**

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1 Ekhougen/Cross-Van Tol
 2 **Q. Okay.**
 3 A. If there are reasons for that.
 4 **Q. Now, you don't say anywhere in this**
 5 **document, unless I am wrong, that Telenor Mobile**
 6 **has a valid enforceable existing agreement, and**
 7 **it wants to go forward with that, you don't say**
 8 **that, do you?**
 9 A. No, I say what I said there.
 10 **Q. I'm sorry. I didn't hear you.**
 11 A. I say what is said in the letter,
 12 they have proposed that we sign the draft
 13 shareholders' agreement that was part of the
 14 voting agreement.
 15 **Q. But at no point did you or anyone at**
 16 **Telenor Mobile go back to Storm and say there**
 17 **will be no further negotiations because we have**
 18 **a valid enforceable contract which is the draft**
 19 **that was attached to the 2002 voting agreement?**
 20 A. I don't think. We never say that we
 21 are never willing to negotiate at all. We
 22 were -- our point was we are in the 12th hour,
 23 let's sign this agreement now. Time is running
 24 out.
 25 **Q. So the answer to my question is no**

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one from Telenor Mobile ever said no changes, we have an enforceable agreement?

A. Well, what people in Telenor in a general sense, I am not willing -- I am not able to answer.

Q. Are you not aware of anyone saying to Storm we are unwilling to negotiate and we have a valid enforceable contract?

A. No. You have seen also the letter that was sent from Oslo, they say the same. Let's sign this agreement as agreed, and then we are willing to negotiate at any time.

Q. Okay. So the point is you were willing to negotiate at any time over the shareholders' agreement?

A. That's what I said.

Q. Now, if you would turn to Exhibit U, which is a series of e-mails from January 22nd, 2004 and January 23rd, 2004. If you turn to the very last e-mail, it's an e-mail from Mr. Didkovskiy to Mr. Hudyakov and Jmak.

Is that how you say his name?

A. Jmak.

Q. And there is a cc to you, correct?

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change in the agreement.

Q. Prior to that, you were handling the negotiations about the technical amendments; correct?

A. I was handling the negotiation from a business point of view, but Mr. Didkovskiy always handled the legal, change of the legal wording so he has been a part of the whole process.

Q. So, it's fair to say now in January 2004 it's getting more complicated and legally substantive Mr. Didkovskiy becomes involved, right?

MR. SILLS: Objection.

CHAIRMAN FEINBERG: Go ahead.

Respond.

Objection overruled.

A. Mr. Didkovskiy was involved in the whole process, and I think if you have, if you look at some of the other, you will find that he's cc'd a lot of the other e-mails.

Q. Now, he's doing a drafting of the agreement; right?

A. Drafting on this particular

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A. It's actually the first e-mail.

Q. Okay. And Mr. Didkovskiy was the lawyer for Telenor Mobile involved in these negotiations; right?

A. That's correct.

Q. What involvement did he have in the 2002 voting agreement negotiations?

A. Actually, I am not sure. But I -- I am not sure.

Q. Have you ever seen his name attached to any of the documents for the prior agreement?

A. He has been Ukrainian legal advisor for Telenor in Ukrainian since '98, so it's most likely that he was part of this negotiations.

Q. But you don't know that for a fact?

A. No. But I would be surprised if he was not.

Q. And why was Mr. Didkovskiy -- I can't say his name. Why was Mr. Didkovskiy involved in January 2004 with these negotiations? Why was he involved?

A. As I say, he was legal advisor to Telenor in Ukraine, and we would like our legal advisor to draft the final provision in this --

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provision, yes.

Q. From the e-mail just above that, Mr. Jmak is also involved at this point, right?

I'm still at page two of this exhibit, there is an e-mail, January 22nd, 2004.

ARBITRATOR CRAIG: Is Jmak acting for Storm?

MR. VAN TOL: I'm about to establish. No, he's Kyivstar.

Q. He was with Kyivstar, right?

A. No, Mr. Jmak is an independent lawyer in Ukraine, at some stage was the legal advisor for Storm when it was Ukrainian company, and he was also, he was substitute to the board representing Storm and Kyivstar.

Q. Do you know why he is involved at this point?

A. I can tell you what I think.

Q. That's all I can ask.

A. As we have said earlier, at that time Storm, we had Ukrainian ownership and Russian ownership, half ownership, and Mr. Jmak was a legal advisor for the Ukrainian part of Storm.

Q. He's a lawyer providing also his

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comments on what was going to be in the
shareholders' agreement, right?

A. He, as you see, he has also --
 Mr. Jmak as written an answer to this e-mail.

Q. And Kyivstar was party to the 2004
shareholders' agreement; right?

A. Yes.

Q. It was not a party to the 2002 voting
agreement?

A. Was it? No, I don't think so. As I
 said, I was not a part of that discussion, but
 they have not signed the agreement.

Q. As far as you know, the voting
agreement was between Storm and Telenor Mobile?

A. Yes.

Q. And Kyivstar was a new party to the
agreement that was executed in January 2004?

A. They were a party to the
 shareholders' agreement, but not to the voting
 agreement, yes.

Q. Okay. Now, we have seen already the
changes that were proposed by Storm and attached
to Mr. Didkovskiy's January 22nd, 2004 e-mail.
Those are the ones that had to do with the

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termination for material breach; correct?

A. Yes.

Q. Now, in the prior version of the
shareholders' agreement, there was a termination
profession in Section 8.308, right?

A. Hum.

Q. And I think you testified earlier
that that had to do with things like people
accepting bribes or failure to file documents
with the Ukrainian government, right?

A. I don't think 808 had to do with
 that, but I think the termination agreement, the
 termination -- the wording about termination had
 to do with bribes earlier.

Q. I understand. Thank you for that.

Now, can we turn please to Exhibit W,
 which has the black line version showing the
 changes between one version of the shareholders'
 agreement and another.

I would like you to turn to the
 termination provisions, and you can use this
 black line version the one with the lines.

Could your turn to termination
 provision in Section 11.02?

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A. 11.02, yes.

Q. You will see in the first line there
is a reference to a material breach in case
there is a breach of Sections 2.05, 6.01 and
6.02, among others.

Do see that?

A. Yeah.

Q. Are you there? You see that, right?

A. Yes.

Q. And you can check back, if you would
like, I am happy to do it with you, Section
2.05.

Has to do with the implementation
and compliance with the agreement?

A. Yes.

Q. Would you agree with me that is an
important provision of the shareholders'
agreement?

A. Yes.

Q. Let's look at 6.01. 6.01 has to do
with debt acquisition, right?

A. Um-hum.

Q. Do you see that?

A. Yeah, yeah.

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Q. And will you agree with me that that
is an important provision, too?

A. Yes.

Q. Okay. And Section 8.01 -- sorry, I'm
sorry, I apologize, Section 6.02. Sorry. I
made you backtrack.

That has to do with non-compete,
correct?

A. Yes.

Q. That is also an important provision
in this agreement, isn't it?

A. Yes.

Q. So, what Storm was proposing as a
material breach was a breach of one of these
several important provisions in the
shareholders' agreement; right?

A. Yes.

Q. And these more expensive termination
provisions that we saw, that we just looked at,
they weren't in the 2002 or the draft of the
shareholders' agreement that was attached to the
2002 voting agreement, were they?

A. No.

Q. Now, if you will look at Exhibit U,

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the changes that Storm is proposing for the material breach sections, they were not just merely accepted by Telenor Mobile, were they?

A. Sorry, what did you say now?

Q. Let me phrase that again.

Telenor Mobile did not just merely accept the changes that were contained in Mr. Didkovskiy's January 22nd, 2004 e-mail, did that?

A. Our prime position was that we should not make any changes.

Q. But there is a negotiation reflected in these e-mails or those provisions regarding --

A. Because they were talking about your good relationship and good partnership and said this was very important for those.

Q. I am trying to get the facts, Mr. Ekhougen.

What I want to know is you were cc'd on these e-mails, there is negotiation over what's going to go in the material breach provisions, right?

A. Yes.

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Q. Okay. And there was questions about how to define material breach in terms of the amount of money, right?

A. Yes.

Q. I believe Storm wanted a very low level, something like 5 million, right?

A. Yes, that's correct.

Q. Telenor Mobile wanted having in the order of 50 million, right?

A. Yes.

Q. And Telenor Mobile prevailed, it got the \$50 million threshold in the material breach; right?

A. Yes.

Q. If you will look at Exhibit U, on the front page there is an e-mail from Mr. Hudyakov to various people, and in that first line it refers to substantive comments that Alpha Bank had on the document; right?

A. Yeah, there is a suggestion, yes.

Q. And he refers to them as substantive, correct?

A. What does actually substantive means?

Q. It means something of substance,

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important.

A. Yeah, he referred to that, yeah.

Q. Did anyone from Alpha ever tell you that they considered the material breach provisions to be merely technical in nature?

A. No. No, they did not. They were insistent to them. They were insisting that these were very important for them.

Q. Okay.

A. After first accepting the agreement as it was.

Q. I understand the chronology.

Do you have an understanding of why Storm wanted these substantive changes to the shareholder agreement?

A. Actually, no. I mean, first they said that they agreed, and as far as I understand, all important business issues over the shareholders' agreement were in place and we were willing to sign and they were willing to sign, and then they obviously changed their mind.

Q. Did anyone from Storm ever tell you that they wanted these provisions to make sure

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that Telenor Mobile lived up to its obligations under the new shareholders' agreement?

A. No, not, no.

Q. Now, you testified earlier about certificates that Telenor Mobile received in January 2004 from Mr. Tumanov and Mr. Kosogov.

Do you remember that?

A. Yes.

Q. Do you know who travelled those certified?

A. Who drafted these certificates?

Q. Yes, who prepared them?

A. No, I haven't the slightest idea.

These were papers from Storm.

Q. Did this certificate come from Telenor Mobile lawyers?

A. They were sent to Oleksiy Didkovskiy, to our Ukrainian lawyer.

Q. What I am asking is the blank forms before they were signed, were they made by Telenor Mobile and sent to Storm, is that how it worked?

A. No, they were sent by Storm.

Q. Now, at the time that Telenor Mobile

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 received those certificates, did it receive copies of resolutions granting Mr. Nilov authority to sign the versions of the shareholders' agreement that had just been negotiated?

A. I don't know exactly what document you got from Storm. As I said earlier, I asked my legal advisor if we had got sufficient documents to verify the signature of the Nilov and he said yes. But, indeed, the documents we got do not have any sort of recognition of --

Q. You have never seen those resolutions?

A. Yeah, I have seen it.

Q. From 2004, have you seen resolutions by Storm's board authorizing Mr. Nilov to enter into that transaction?

A. No.

Q. Did anyone from Storm ever tell you in January 2004 that such resolutions were not necessary?

A. They told us, Khudyakov told us that they are prepared to sign, that Nilov was authorized to sign and that they would send us

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 the necessary documentation.

Q. I have a different question.

Focusing on the resolutions now, did anyone from Storm tell you or anyone else at Telenor Mobile, don't worry, we don't need resolutions to sign this agreement?

A. I don't know what they told anyone else in Telenor, but they did not tell me. They did not tell me at all what kind of documents they were sending. I asked my lawyer if we have got enough documentation and he said yes.

Q. By the way, your lawyer, did you provide him a copy of Storm's charter in connection with the January 2004 agreement?

A. Storm's charter?

Q. Storm's charter.

A. I did not have Storm's charter at that time.

Q. To your knowledge, did anyone at Telenor Mobile give your lawyer a copy of Storm's charter?

A. I don't -- I don't know.

Q. We have seen what Telenor Mobile had in its files, correct?

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 A. Pardon?
Q. Telenor Mobile had a copy of Storm's charter in its file; right?

A. I don't know.

Q. We just established they got it in October 2002?

A. Yeah. Okay. But I did not know.

Q. Who else from Telenor Mobile other than you was involved -- in the business side was involved in the negotiation of the January 2004 agreement?

A. Mr. Khudyakov, who is mentioned in one of the documents, was my boss in Oslo, but the Telenor members, the Telenor directors and the board were also involved.

Q. The agreement was signed on January 30th, 2004, correct?

A. Yes.

Q. And so it was signed one day before the extension agreement was due to expire, right?

A. Yep.

Q. And it was signed two days before your power of attorney was about to expire,

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 right?

A. Yes.

Q. It was a big rush to get it done before those deadlines, wasn't it?

A. It was not a big rush, we extend the period for six weeks and we like to keep the pressure on the discussion.

Q. What kind of corporation documents of Storm did you or your lawyers review before entering into the transaction other the certificates we have talked about already?

A. I don't know what kind of documents my lawyer saw. I did not go into the Storm documents.

Q. Were you told by anyone at Storm that there had been a meeting of participants around January 2004 that authorized Mr. Nilov to enter into the new shareholders' agreement?

A. No.

Q. Were you told by Storm that a meeting of participants was not required?

A. No.

Was told by Khudyakov that they were prepared to sign.

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Q. Your understanding of the shareholders' agreement, the 2004 shareholders' agreement, is that it required shareholders to purchase Kyivstar shares after an IPO, is that right?

A. There is some provision on what happens after an IPO, yes.

Q. And it says that, for example, Storm as a shareholder must purchase Kyivstar shares, right?

A. As far as I remember, the wording is exactly the same as it was in the voting agreement.

Q. Okay. So they both require the acquisition of shares by Storm, right?

A. If there was an IPO, yeah.

Q. Okay. Let me just quickly ground that out and make sure we are talking about the same provision.

Could you turn to Exhibit Y and specifically provision 2.03?

A. 2 --

Q. 2.03. Do you see that?

And isn't it in 2.03B where there is

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a requirement on the shareholders to purchase Kyivstar shares?

A. Okay, yeah.

Q. That's it, right, that requires the acquisition of shares?

A. Um.

Q. And do you recall we saw earlier that Section 12.4 of the Storm charter said that where there is an acquisition of shares, the general director needs approval from the meeting of participants, right?

A. But, yes, it's correct. But this is part, as far as I recollect, I mean, this is a provision that was introduced in 2002.

Q. I understand your theory, but your answer is yes, right, Section 12.4 of the Storm charter requires a meeting of participants in order for there to be an acquisition of shares?

A. Yeah, I think I remember that, yeah.

Q. And it specifically says Kyivstar, right?

A. Kyivstar was the only assets that Storm had.

Q. Okay. Could you turn to page 36 of

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Exhibit Y, which is the signature page.

I have got five minutes tops.

Sorry if I overran my estimate.

That last signature on the page for Kyivstar, who is that?

A. Lytovchenki, the president of Kyivstar.

Q. Mr. Ekhougen, if you know, what authority did Mr. Lytovchenki have to sign the 2004 shareholders' agreement?

A. I can't answer that question.

Q. Do you know who would know? Your lawyers?

A. We have to go through the lawyers, yes.

Q. Have you seen any documents evidencing, showing Mr. Lytovchenki's authority in connection with this agreement?

A. With this?

Q. Yes.

A. I can't, I -- no, I can't remember. Maybe.

Q. Now, let me move on to a new area.

ARBITRATOR JENTES: Before you do --

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MR. VAN TOL: Yes.

ARBITRATOR JENTES: Is there a contention in this case, that is this arbitration, that Mr. Lytovchenki didn't have authority to sign on behalf of Kyivstar?

MR. VAN TOL: I can't say that yet because I haven't seen any of the documents associated with his authority, whether he had authority or not. I was just asking the witness if he has seen some documents. I haven't, so in answer to your question --

ARBITRATOR JENTES: We are in an arbitration, or at least a putative incitral arbitration, and there is claims and defenses and I am just wondering is the position of Storm here that this gentleman didn't have the authority to sign on behalf of Kyivstar.

MR. VAN TOL: I have to answer that we don't know yet because it wasn't until Wednesday of this past week that we knew that the merits of contract formation was

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going to be an issue.

We had focused on one of the issues, which was was there a meeting of participants, since we have seen no evidence of that, and we have a court ruling in the Ukraine saying that is enough.

We haven't probed further, but with the tribunal's permission we'll probe further and present any evidence we can present on the details of contract formation. I don't know yet. I can't answer that question without reviewing the files and speaking to my client.

ARBITRATOR JENTES: Well, do I understand correctly that Storm, neither Storm nor Alperin made any claim in the Ukrainian courts that this gentleman didn't have the authority to sign on behalf of Kyivstar?

MR. VAN TOL: As far as I'm aware, there has been no such challenge in the Ukrainian courts. Sorry I can't answer further.

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with the Court decisions that have brought us here today, the April and May 2006 decisions invalidating the shareholders' agreement.

Why did Telenor Mobile not appeal either one of those decisions?

A. As far as I am -- I mean, now, we have to, I have to rely on the advice we got from our lawyer. We were not a part of this, and we have -- this arbitration is empanelled to decide on the shareholders' agreement as it said in the shareholders' agreement.

Q. Has anyone ever told you that you, Telenor Mobile, has no right to intervene in the Ukrainian proceeding?

A. That we have no right to intervene in the Ukrainian proceeding?

Q. Right. Has anyone ever said that to you?

A. No.

Q. Isn't it true that Telenor Mobile recently went back to an appellate court in a related matter and got it to reverse its decision?

A. Storm filed a fact-finding that came

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Q. Mr. Ekhougen, to your knowledge, Telenor Mobile did not take this shareholders' agreement and file it with the Ukrainian authority, did it?

A. The shareholders' agreement?

Q. Right.

A. Not to my knowledge, the charter has to be filed as far as I know, not the shareholders' agreement.

Q. As far as you know, the shareholders' agreement in Ukrainian has not been filed with the Ukrainian authorities?

A. I have to answer I don't know.

Q. Okay.

A. As far as I know, no.

Q. Okay. Now, I have the same question for the voting agreement.

To your knowledge, was the voting agreement ever filed in the Ukrainian language with Ukrainian authorities?

A. As I said previously, I was not involved in the voting agreement. I don't know what happened.

Q. My last areas of questions have to do

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up with the evidence they have a reason to reopen the case. So the answer is yes.

MR. VAN TOL: Okay. Subject to any recross, I am done.

MR. SILLS: Can I have just one moment, Mr. Chairman?

Mr. Chairman, we have no redirect.

MR. VAN TOL: Then I have no recross.

CHAIRMAN FEINBERG: Any further questions of this witness from the panel before we dismiss the witness with thanks for his being here today?

I have none.

ARBITRATOR CRAIG: With respect to the amendments to the shareholders' agreement that Storm proposed, you testified earlier that I am trying, as close to a quote, Storm insisted that it was very important to them.

Do you remember that testimony.

THE WITNESS: Yes.

ARBITRATOR CRAIG: Did anyone from Storm ever tell you why these changes were important to them?

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2 THE WITNESS: Not to my knowledge.
3 Not except what is written in the letter
4 from Storm.

5 ARBITRATOR CRAIG: Do you have any
6 understanding as to why these particular
7 changes dealing with material breach were
8 important to Storm?

9 THE WITNESS: No. I was surprised
10 that there is an issue.

11 ARBITRATOR CRAIG: You were
12 surprised?

13 THE WITNESS: I was surprised that
14 this issue was raised by Storm.

15 ARBITRATOR JENTES: You mean during
16 this negotiation that you have had with
17 their representative?

18 THE WITNESS: After, after they have
19 told us that they have an issue, that we
20 agree, I was really surprised that they
21 have in the 12th hour came up with any
22 kind of proposal.

23 ARBITRATOR CRAIG: That's between the
24 November and December communications;
25 correct?

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2 your summation when you move on the motion
3 after lunch?

4 MR. VAN TOL: Correct.

5 CHAIRMAN FEINBERG: And I take it you
6 have no further witnesses and that you,
7 too, will marshal your evidence on the
8 motion in opposition to the motion after
9 lunch?

10 MR. SILLS: That's correct,
11 Mr. Chairman.

12 CHAIRMAN FEINBERG: Why don't we
13 propose this, subject to either of my
14 colleagues suggesting a better way.

15 Why don't we reconvene at one
16 o'clock, give each side as we did last
17 month up to 30 minutes to present whatever
18 arguments they want to make, whatever
19 evidence they want to marshal, subject to
20 the panel extending that time on rebuttal,
21 et cetera, if the issue is joined and
22 there is debate.

23 But up to 30 on the motion, Storm
24 going first and a 30-minute response from
25 Telenor.

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2 THE WITNESS: It came up. It came up
3 in, as I said, in a board meeting in
4 December where they, at the same time,
5 told us that the Omega deal, the Omega
6 transaction was closed, and we have,
7 according to the agreement, should sign.

8 ARBITRATOR CRAIG: At the time they
9 raised that issue of changes in the
10 shareholders' agreement, did they explain
11 to you why it was important to them?

12 THE WITNESS: No. We had no more
13 explanation. As I said, that was in this
14 letter that they said that this is
15 important.

16 CHAIRMAN FEINBERG: Anything else?
17 Thank you very much.

18 Mr. Ekhougen, thank you for your
19 presence today as a witness.

20 We appreciate it very, very much.
21 And thank you for being here today.

22 Why don't we do this? I take it,
23 Storm, you have no witnesses, live
24 witnesses to call today, and any
25 marshalling of evidence will be part of

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2 Storm, you need not reserve any time
3 for rebuttal, because we will see how that
4 goes.

5 MR. VAN TOL: Okay.

6 CHAIRMAN FEINBERG: Let me just, as
7 one arbitrator, and I would like to have
8 Bill and Greg if they want, make a
9 comment.

10 Let me, when you are having lunch
11 today and you are marshalling your facts
12 and your arguments.

13 I have one question that I request
14 each counsel focus on, at least one that I
15 am interested in.

16 Storm, in pursuant of your motion,
17 what evidence do you offer for the
18 proposition that Telenor -- that Storm
19 lacked apparent authority in moving
20 forward with the transaction. Not actual,
21 apparent.

22 And, Storm, what evidence do you
23 offer for the proposition that Telenor
24 knew there was not even apparent
25 authority?

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2 Telenor, my question that I would
3 like you to focus on in part, at least in
4 your argument, what are we to do with the
5 Ukrainian court decisions? Why aren't you
6 making your arguments here today to the
7 Ukrainian courts, or I guess even the
8 Southern District of New York, why are you
9 here asking us basically, I think either
10 Bill or somebody suggested that we are in
11 effect being asked to rule an appellate
12 court and upset apparently what is going
13 to in the Ukrainian courts, when as I
14 understand it, correct me if I am wrong,
15 in your argument, you haven't maintained
16 that the Ukrainian courts are unwilling or
17 unable to render a decision on anything
18 other than reasons on the merits.

19 So why are we at this date being
20 asked to substitute your opinion on
21 jurisdiction for rulings in the Ukrainian
22 courts? Aren't you in the wrong forum?

23 And that's what I would like to sort
24 of pose to you guys as opposed to Storm.
25 I don't know if Bill or Greg have any

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2 other questions or to guide them over the
3 next hour or so in their lunch break as
4 they will get ready to marshal their
5 arguments.

6 ARBITRATOR JENTES: My only comment,
7 Ken, would be that while a half an hour
8 ought to be allotted to both sides, I
9 personally have a lot of questions, and
10 consequently I think that both sides ought
11 to recognize that there is going to be
12 questioning from the panel and we are not
13 going to finish by 2 o'clock, that's all.
14 Both sides ought to recognize that as the
15 reality here.

16 CHAIRMAN FEINBERG: Greg, anything?

17 ARBITRATOR CRAIG: No.

18 CHAIRMAN FEINBERG: We will reconvene
19 at one o'clock.

20 (Whereupon, a luncheon recess was
21 taken at 12:00 p.m.)

22 * * *

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2 CHAIRMAN FEINBERG: Okay. Now,
3 anyway, as I mentioned before lunch, let's
4 go to summary oral argument. As I say, as
5 I mentioned, subject to Bill's gloss about
6 giving people plenty of time, let's take
7 the high road and give each side 30
8 minutes, which the chair will sort of at
9 its discretion coordinate or control,
10 extending 30 minutes in light of any
11 questions that the panel or others may
12 advance.

13 And with that thought, the first 30
14 minutes go to the movant, Storm.

15 Pieter.

16 MR. VAN TOL: Thank you,
17 Mr. Chairman.

18 What I would like to do is I actually
19 re-ordered my presentation so I can deal
20 with the authority first. I hope it's not
21 too scattered.

22 I would like to hit on the authority
23 issue that the Chair raised before. I did
24 have an extended discussion on choice of
25 law. I think I can greatly truncate it,

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2 because I think that Mr. Sills and I are
3 agreed, at least on apparent authority,
4 the law seems to be the same between
5 Ukraine and New York.

6 Let me start out by reference to the
7 Sphere Drake case. Our stance on the
8 Sphere Drake case is that it sets forth
9 the evidentiary standard that we have to
10 meet on our motion to dismiss.

11 We have never taken the position that
12 Sphere Drake applies substantively to the
13 issue before the tribunal. And it's
14 interesting that Telenor Mobile agreed
15 with us in the prior briefing and at the
16 last hearing Mr. Sills tried to
17 distinguish Sphere Drake as an agency
18 case, saying it didn't apply.

19 That's a minor point, but I will move
20 on.

21 The bigger point is that there are
22 two types of authority, as the tribunal is
23 well aware. There is actual authority and
24 there is apparent authority.

25 Now, staying with choice of law, when

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2 it comes to actual authority, the cases
3 are clear that that turns on the company's
4 internal organization, which, again, is a
5 question for the law of the place of
6 incorporation. It is not a question of
7 New York law. It's a question of
8 Ukrainian law.

9 And not for now, but for the
10 tribunal's consideration whenever they
11 would like, I'm going to hand up the
12 Lehman Brothers versus Tootlers case, and
13 I would like to draw the tribunal's
14 attention to footnote four, where it makes
15 it express that where you are talking
16 about actual authority, you go to the law
17 at the place of incorporation.

18 Again, I don't want that to delay us,
19 because I think the Chairman made it clear
20 in his mind that he wants to hear about
21 apparent authority. I will cover both,
22 but I will move on to apparent.

23 We maintain that it's a well-accepted
24 proposition that the Court will look at
25 where the transactions took place, and it

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2 courts that Mr. Nilov lacked authority;
3 that ought to be the end of the matter.

4 But if we go through Mr. Rabij's
5 affidavit and the various arguments that
6 he makes, we will see that even if these
7 arguments had been raised in the Ukrainian
8 courts, they would have failed.

9 I am taking these not in the order he
10 makes them, but he does, Mr. Rabij does
11 make an argument that any limitation on
12 Mr. Nilov's powers would have been
13 effective under Ukrainian law only if
14 Telenor Mobile knew or should have known
15 about the limitation. That is in
16 paragraph 31 of his affidavit. He cites
17 the Ukrainian law and the Ukrainian law he
18 attaches seems to support that
19 proposition.

20 I think the record is as clear as it
21 is ever to going be after today, that
22 Telenor Mobile had actual knowledge of a
23 limitation on Mr. Nilov's powers. We saw
24 that in connection with the 2002 voting
25 agreement, Storm sent Telenor Mobile their

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2 won't just look at the choice of law
3 clause, and that if you look at the
4 transaction here it has absolutely no
5 nexus to New York, but given that there is
6 a false conflict, as Mr. Sills said, let
7 me go on to consider Ukrainian law.

8 And I think for that, we are going to
9 have to make reference to Mr. Rabij's
10 affidavit, which is supplied in connection
11 with this hearing.

12 The first point, though, I would like
13 to make is if we are going to be looking
14 at Ukrainian law, I would submit that the
15 place to start is the Ukrainian court
16 decisions. I'm not a Ukrainian lawyer, I
17 have no reason to doubt Mr. Rabij's
18 expertise, just as I have no reason to
19 doubt our expert's opinion, but really
20 when you come down to it, you have to
21 assume that Ukrainian courts are the place
22 where Telenor Mobile should have gone to
23 make any of these apparent authority
24 arguments.

25 We have a decision from Ukrainian

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2 charter. Their charter clearly lays out
3 that when it comes to transactions that
4 involve the acquisition of the Kyivstar
5 shares, there has to be a meeting of
6 participants. It says it right there in
7 Section 12.4, subsection two, I believe,
8 the one we looked at with Mr. Ekhougen
9 earlier.

10 Further evidence of the requirement
11 is the fact that in 2002, October 2002,
12 Storm sent resolutions to Telenor Mobile
13 saying for this type of transaction, the
14 voting agreement that is described as
15 having to do with the disposal of shares,
16 you need a resolution, so they got one.
17 In that same document that I went through
18 with Mr. Ekhougen, you saw that it
19 described the shareholders agreements in
20 exactly the same way.

21 Everyone here describes the
22 shareholders' agreement as a bridge --
23 excuse me, the voting agreement, as a
24 bridge between the two shareholders'
25 agreements. They have functionally at the

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2 bottom the same purpose, which is to
3 effect the purchase of shares.

4 And if that's the case, and I think
5 we have established that, you have to have
6 authority, you have to have resolutions,
7 you have to have a meeting of
8 participants. It's right in Storm's
9 charter. Storm gave that charter to
10 Telenor Mobile. That is actual authority.
11 I'm sorry. That is actual knowledge.

12 Now, even if we take Mr. Ekhougen at
13 his word, and he says I have never seen
14 this document before, this is the first
15 time I have seen it. He at least said
16 that it's his belief that someone at the
17 company would have seen it at some point,
18 and that imposes the second part of the
19 test, which is constructive knowledge.

20 Even -- you can't sit in Telenor
21 Mobile's position and say, yes, the
22 charter says that; yes, it's in my files;
23 but, you know, I just didn't realize it in
24 connection with the later agreement.

25 Telenor Mobile is charged with the

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2 knowledge that it had, which is that the
3 charter imposes a clear, unambiguous
4 limitation in this case.

5 Nothing in Mr. Ekhougen's testimony
6 contradicted our view that the case
7 involves an acquisition of shares. Under
8 those circumstances, it's clear that one
9 of limitation applies. And really what it
10 really sounds like happened is nobody
11 picked up on it.

12 You heard Mr. Ekhougen say there was
13 a last minute flurry of activity. There
14 were new parties involved. He's not aware
15 of the due diligence.

16 ARBITRATOR JENTES: Who are the new
17 parties?

18 MR. VAN TOL: The new party is
19 Kyivstar and the new lawyers are involved.

20 ARBITRATOR JENTES: Weren't Kyivstar
21 involved in the earlier versions, let me
22 put it that way, of the shareholders'
23 agreement?

24 MR. VAN TOL: Not -- it doesn't
25 appear that they were to the draft in

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2 2002.

3 ARBITRATOR JENTES: Well, they are
4 shown on the cover sheet as a party.

5 MR. VAN TOL: They didn't sign it, so
6 I guess --

7 ARBITRATOR JENTES: Nobody signed it,
8 but I mean, weren't they involved at that
9 point?

10 MR. VAN TOL: I don't know. I don't
11 know.

12 So what I should really focus on is
13 there are new lawyers involved,
14 apparently --

15 ARBITRATOR JENTES: What difference
16 does that make?

17 MR. VAN TOL: That's the key. The
18 difference it makes is in the earlier
19 transaction it looks like there was due
20 diligence done; in other words, Telenor
21 Mobile says, get me a certificate, get me
22 your charter. I want to see everything
23 that gives you the authority to sign.

24 Storm handed it over. That same
25 thing didn't happen again in connection

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2 with the January 2004 agreement.

3 ARBITRATOR JENTES: One thing that I
4 am puzzled about was didn't Storm know all
5 of that at the time it signed the
6 agreement in January of 2004?

7 MR. VAN TOL: That I don't know, what
8 I know is --

9 ARBITRATOR JENTES: How could they
10 not know, but you say that Telenor did
11 know?

12 I mean, as I understand your
13 argument, your argument is that Telenor
14 knew that there wasn't any authority
15 because it had access to the charter, et
16 cetera, et cetera.

17 Well, didn't Storm have all of that?

18 MR. VAN TOL: It did. But that's why
19 I have gone to the second prong of it,
20 which is should have known.

21 ARBITRATOR JENTES: They knew. Why
22 didn't they say something --

23 CHAIRMAN FEINBERG: Why didn't Storm
24 say something?

25 ARBITRATOR JENTES: -- Storm say

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2 something?

3 MR. VAN TOL: All I can offer you,
4 given that we haven't had our own
5 witnesses here, if you will notice the
6 quality of this transaction versus the
7 other one. In the other transaction, we
8 have clear evidence that Mr. Wack was
9 involved, Mr. Quire Sanders. We have
10 evidence that Mr. O'Driscoll was involved.

11 This second transaction looks like an
12 affair that was conducted by lawyers in
13 Ukraine and lawyers in Russia, and I don't
14 know what they knew about the prior
15 transaction.

16 CHAIRMAN FEINBERG: See, how does
17 that help you? You don't know what your
18 client's internal documents would show.
19 You have mentioned a half a dozen times
20 today that you don't know. And, really,
21 to what extent are you on the horns of a
22 dilemma here, when the arbitration panel
23 says isn't, in effect, isn't Storm
24 estopped?

25 Didn't they waive this shareholder,

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2 asking us to make certain suppositions
3 here, aren't you?

4 MR. VAN TOL: Mr. Chairman, that
5 actually is the point. You are not an
6 appellate panel. These are the kinds of
7 things that Telenor Mobile should have
8 gone to the Ukraine to get satisfied.

9 CHAIRMAN FEINBERG: Well, you will
10 recall, Pieter, I have asked Telenor
11 Mobile when it's their turn to comment on
12 it.

13 MR. VAN TOL: I feel compelled to
14 comment on it because it is the point. We
15 are having this great discussion that
16 really goes to the merits, and in two days
17 I haven't investigated all my client's
18 files? I have got clients in a couple
19 countries, to try to assemble the files.

20 If we want to have a hearing on the
21 merits, so be it, but that's not what
22 Sphere Drake says.

23 ARBITRATOR JENTES: I think we
24 understand that. The problem I have is
25 you make these arguments about what

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2 this meeting requirement in light of the
3 fact that they're pushing the very same
4 deal that gets signed as Telenor is in
5 2004? How can you now say that, well,
6 there wasn't compliance, and I am not sure
7 what we knew or when we knew it, but I
8 know there is not compliance on the other
9 side.

10 MR. VAN TOL: Well, Mr. Chairman,
11 what we are doing is, you are looking at
12 this case from the Sphere Drake standard,
13 which is there is a finding by the
14 Ukrainian court --

15 CHAIRMAN FEINBERG: That's a
16 different argument.

17 MR. VAN TOL: But that's what colors
18 that we look at. We look at is there
19 evidence of a meeting of participants.

20 CHAIRMAN FEINBERG: Do you know if
21 the Ukrainian court found, as matter of
22 Ukrainian law, that there was no apparent
23 authority?

24 MR. VAN TOL: I don't know that.

25 CHAIRMAN FEINBERG: You are sort of

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2 Telenor knew or should have known, et
3 cetera, and my problem is why doesn't that
4 apply to Storm as well?

5 MR. VAN TOL: That's what the cases
6 say. Sphere Drake says, if I am opposing
7 arbitration, and I can come in and show
8 that the other guy either knew or should
9 have known that my agent lacked
10 authority --

11 ARBITRATOR JENTES: I'm sorry to be
12 repetitive.

13 I just don't understand. Every point
14 that you make to say they knew is all
15 drawn from Storm documents, isn't it?

16 MR. VAN TOL: I understand. That is
17 the way ultravirus works though. If you
18 are able to satisfy these standards, as a
19 company, I may disavow the act of an
20 officer acting who is acting ultravirus.

21 ARBITRATOR JENTES: You can take a
22 year or two years to do that?

23 MR. VAN TOL: Whenever you discover
24 it. As soon as we discovered it, we
25 brought it to the Ukrainian court's

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2 attention. We said there is no meeting of
3 participants.

4 ARBITRATOR JENTES: Who discovered
5 it?

6 MR. VAN TOL: It was done in the due
7 diligence by one of the Alpha companies
8 looking back at the books and records.
9 They said there is no evidence that there
10 is a meeting of participants and there
11 still isn't any evidence of it.

12 So you are allowed -- it happens all
13 the time. I shouldn't say all the time.
14 It happens. Companies say someone was
15 acting without authority. This agreement
16 is null and void. It's exactly what
17 happened here.

18 ARBITRATOR CRAIG: Why aren't you
19 estopped after a year and half in
20 complying with the agreement, relying on
21 terms of the agreement, making stock
22 purchases, why aren't you estopped from
23 making that argument?

24 MR. VAN TOL: That's an excellent
25 question.

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2 The case law on ramification and
3 estoppel is very clear. It says that the
4 party to be estopped must know that there
5 was a problem and doesn't it bring it up.
6 That's not us. It's not as if we sat on
7 it.

8 ARBITRATOR CRAIG: That makes his
9 question relevant, though.

10 MR. VAN TOL: I have never said it
11 wasn't relevant. It's highly relevant. I
12 was focusing on the first standard. But
13 the issue is: What ratification and
14 estoppel go to is so you don't sign an
15 agreement with your hands behind your
16 backs say ah-ha, I fooled these guys.
17 There is no evidence of that here. To the
18 contrary.

19 ARBITRATOR JENTES: Why? You wrote
20 all these affirmations, and sent them to
21 them at the time and said we have got the
22 authority to sign.

23 MR. VAN TOL: They were wrong.
24 Either a lawyer at Storm was wrong, or a
25 lawyer at Telenor was wrong, or it's a

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1 Proceedings
2 failure to do due diligence. Mistakes
3 like this happen all the time.

4 CHAIRMAN FEINBERG: They do?

5 MR. VAN TOL: That's why we have --

6 CHAIRMAN FEINBERG: Why aren't you
7 estopped because they were wrong?

8 MR. VAN TOL: That's precisely it.
9 They didn't know they were wrong.

10 As soon as Storm found out that there
11 was something wrong with this transaction,
12 it went to the proper place, which is the
13 Ukraine court, and got it straightened
14 out. If Telenor Mobile didn't like it, I
15 don't blame them.

16 ARBITRATOR JENTES: Yeah, them Storm
17 didn't go.

18 MR. VAN TOL: I'm sorry. Alperin. I
19 would have been in court if I were Telenor
20 Mobile at the drop of a hat, saying I am
21 going to sue you for breach of contract,
22 I'm going to sue you on estoppel and I'm
23 going to sue you on ratification.

24 CHAIRMAN FEINBERG: You don't think
25 that the parties at Storm that negotiated

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1 Proceedings
2 this deal were perfectly comfortable with
3 it and subsequent events led new
4 management to decide let's find a way to
5 upset the deal?

6 MR. VAN TOL: I don't know that.

7 CHAIRMAN FEINBERG: Yeah.

8 MR. VAN TOL: If I knew that, I would
9 tell you. I don't know that other than I
10 know that corporate formalities have to be
11 followed, and they have to be followed for
12 a very important reason.

13 CHAIRMAN FEINBERG: We understand
14 that corporate formalities have to be
15 followed. But we are troubled, at least I
16 am troubled by Bill's point. I'm troubled
17 by, we're going to show you, panel,
18 Telenor shouldn't benefit from this deal
19 when we knew about requirements and we
20 didn't require them either because of the
21 rush to get the deal done.

22 MR. VAN TOL: Well, there is two
23 issues there. One is there is no evidence
24 that we knew what was being done was
25 against the charter; that's one.

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2 The second one is I would feel the
3 same sympathy for Telenor Mobile if they
4 had no relief here. If they were like,
5 oh, what am I going to do?

6 They have relief here. We have said
7 it until we are blue and red in the face.

8 CHAIRMAN FEINBERG: Isn't that your
9 primary argument?

10 MR. VAN TOL: It is. Our primary
11 argument is to this tribunal --

12 ARBITRATOR JENTES: What if they went
13 to the Ukraine courts now, would you
14 oppose that?

15 MR. VAN TOL: Probably on procedural
16 grounds, or we would say there is no new
17 evidence, but we would be in the same boat
18 as we are with them going back and having
19 revisited the December 22nd order. That's
20 what they should be doing.

21 I continue to be mystified. As a
22 lawyer, the first thing I would advise a
23 client who has a judgment against them in
24 a foreign country is not to say, let's
25 wait and arbitrate this.

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2 apparent authority.

3 Then he goes on to say, and this is
4 Telenor Mobile's big theory, apparently
5 the resolutions for 2002 for the voting
6 agreement were sufficient authority for
7 what came thereafter. And that this
8 language enabling Mr. Nilov to take other
9 actions, that he can take that out how
10 many months later, more than a year later
11 for a document that we saw today is
12 materially different.

13 Storm had a reason for getting those
14 provisions. They were worried that
15 Telenor Mobile was going to pull a fast
16 one.

17 CHAIRMAN FEINBERG: If it wasn't
18 materially different, if it was
19 immaterially different, would you have a
20 different argument?

21 MR. VAN TOL: I may. Then you can
22 see -- but if I were Telenor Mobile I
23 would have said exactly what I asked Mr.
24 Ekhougen. Why are you coming to me with
25 these changes? We have a legally

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2 CHAIRMAN FEINBERG: Why are you
3 mystified? Don't you understand the
4 possibility at least that if they were to
5 go back to the Ukrainian court now, you
6 would be first one opposing that on the
7 ground that they waived their right now to
8 go back to the Ukrainian court.

9 Isn't that a fortiori what you
10 obviously would do?

11 MR. VAN TOL: I am going to do that,
12 but if I were Telenor Mobile, if I were
13 Telenor Mobile, I wouldn't think, well,
14 this is a futile act.

15 They just won one. I would be
16 feeling pretty good if I were Telenor
17 Mobile.

18 I would expect them to be before the
19 Court of Cascais or someone saying, you
20 know what, a wrong has been committed
21 here.

22 CHAIRMAN FEINBERG: Okay. Go ahead.

23 MR. VAN TOL: I should go on to
24 quickly talk about Mr. Rabij's other
25 points, although the main one is the

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2 enforceable, binding agreement.

3 CHAIRMAN FEINBERG: I understand
4 that.

5 Let's say that we conclude that the
6 changes are immaterial, not material,
7 would you then agree that there is no
8 reason to go for a purely pro forma
9 exercise to get approval?

10 MR. VAN TOL: I don't think so,
11 Mr. Chairman, because it's more than that
12 the changes are material. That was an
13 unenforceable agreement.

14 CHAIRMAN FEINBERG: Regardless of
15 materiality?

16 MR. VAN TOL: Exactly.

17 CHAIRMAN FEINBERG: So you don't know
18 whether it's material or not is relevant
19 at all.

20 MR. VAN TOL: I do think it is
21 relevant. It is one of our arguments.
22 But you notice I asked Mr. Ekhougen two
23 areas, I said, what if the Omega deal went
24 bad, what would happen? No deal.

25 It's unenforceable as a matter of

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2 law, you can't agree to agree.
3 First of all, it was contingent upon
4 an event that might not have happened.
5 And, secondly, I said in your view,
6 was it an enforceable agreement?
7 Everything they wrote back to Storm
8 was, come on, I thought we had this
9 agreed. Why are you doing this to me at
10 the last minute? They didn't run in and
11 say, tough, under Norwegian, Ukrainian,
12 some law I have an enforceable contract
13 and I am going to enforce it.

14 ARBITRATOR CRAIG: Why then did
15 Storm, pursuant to its charter, go to the
16 participants and seek ratification, if at
17 that time it wasn't an enforceable
18 agreement and the Nilov signature was not
19 a meaningful signature?

20 MR. VAN TOL: Why didn't it go and --
21 CHAIRMAN FEINBERG: Why did it in
22 2002?

23 It did, in fact, go to the
24 participants in August for a poll and then
25 in October for an actual meeting to ratify

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1 Proceedings
2 occurred in 2002, August and October, by
3 the participants covered only the voting
4 agreement, did not cover the shareholders'
5 agreement?

6 MR. VAN TOL: That's exactly it.

7 ARBITRATOR JENTES: Even if it was an
8 attachment to the voting agreement?

9 MR. VAN TOL: Even though, because
10 these are the things where you say, you
11 know, we have all seen these in
12 agreements, later we are going to agree to
13 something in this form, because you want
14 to lay out what the general parameters of
15 the discussion are.

16 We have seen from today's testimony
17 there was no limit on renegotiating this.

18 ARBITRATOR JENTES: Wasn't there an
19 arbitration clause in the voting
20 agreement?

21 MR. VAN TOL: There was.

22 ARBITRATOR JENTES: Is that binding?

23 MR. VAN TOL: I don't think it is,
24 because don't forget the Ukrainian
25 court --

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1 Proceedings
2 the poll. If that signature was not a
3 meaningful signature, why did Storm feel
4 the need to get ratification from the
5 participants.

6 MR. VAN TOL: That charter, that's
7 only for the voting agreement aspect of
8 it, it's not for the shareholders'
9 agreement. It's clear that the authority
10 is limited to go sign the voting agreement
11 and, you know, we have seen these. If
12 something comes up at the closing that you
13 are not sure of, deal with that.

14 There is that New York case that they
15 cite, Scientific Holding, where the Court
16 was, Judge Friendly was saying, I'm not
17 sure how much power a corporate officer
18 has to make material changes at a closing,
19 but we don't have that evidence. The
20 voting agreement looked pretty
21 straightforward. They got authority.
22 They signed it up. Any earlier draft
23 didn't change. It was done.

24 ARBITRATOR CRAIG: You are taking the
25 position that the ratification that

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2 ARBITRATOR JENTES: No, passing the
3 Ukrainian court for a moment.

4 MR. VAN TOL: I don't think we can.
5 It's not a valid agreement.

6 ARBITRATOR JENTES: No, no. I'm
7 going to come back to it, but I am just
8 looking on this question about what was
9 signed or not signed and Mr. Craig's
10 questions to you.

11 If he had the authority to sign the
12 voting agreement, and the voting agreement
13 had a provision for arbitration, why isn't
14 that binding?

15 MR. VAN TOL: That's not a binding
16 agreement under Ukrainian law. The
17 Ukrainian court found because it goes to a
18 foundational document or affects
19 foundational documents. This goes to the
20 whole limitation point and knowledge of a
21 limitation.

22 The Ukrainian court said, the trial
23 court said you have got to file this in
24 Ukrainian and register it in the Ukraine,
25 so that someone doing business with Storm

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2 says, oops, these shareholder agreement
3 and the voting agreement, they can have an
4 effect on the charter.

5 The charter may not be as it seems.
6 That was the alternative basis for the
7 trial court's holding and it went out of
8 its way to say that reason alone knocks
9 out both the voting agreement and the
10 shareholders' agreement.

11 So, even with respect to that
12 agreement, all the corporate formalities
13 weren't followed. That's what the
14 Ukrainian court found.

15 ARBITRATOR JENTES: Back to your
16 materiality argument on what was done in
17 2004.

18 What is your view on the severability
19 clause? And let me be precise. If you
20 were in most U.S. courts, and you were to
21 come in with the provisions that are now
22 in 11, I think most U.S. courts would say,
23 oh, we will worry, we will do some changes
24 in the agreement, but we won't strike down
25 the agreement as a whole, including an

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2 arbitration agreement, just on the basis
3 of this particular clause in Article 11.

4 MR. VAN TOL: That might work if it
5 were some clause of lesser import. I'm
6 not sure, but I have to look at the
7 severability provisions of the agreement.

8 It might work in that circumstance if
9 it's a, I don't know, who do the notices
10 go to. That's why I asked Mr. Ekhougen at
11 the end and he agreed with me, each of
12 those material breaches went right to the
13 heart of the agreement. It was you will
14 do these things, you will acquire debt,
15 you will not compete with me. He agreed
16 with me that each one of those triggers --

17 ARBITRATOR JENTES: The clauses that
18 you referred to are material. Is the
19 Article 11 material, which is a little
20 different?

21 MR. VAN TOL: It is because it cross
22 references those highly material points.
23 That's why it's in there. It was
24 important enough for Storm that they
25 almost killed this deal. You saw how

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2 close it came. They got done at the last
3 minute.

4 It wasn't, I don't like this word on
5 page 15. It was I'm afraid that my
6 counterparty is going to do something bad,
7 and they had extensive negotiation about
8 what this --

9 ARBITRATOR JENTES: What is the
10 remedy that's provided in Article 11 if it
11 was concerned about Telenor doing
12 something bad?

13 MR. VAN TOL: The remedy was it was
14 considered a material breach of the
15 agreement and there is no agreement.

16 ARBITRATOR JENTES: No. It then goes
17 to arbitration.

18 ARBITRATOR CRAIG: Who finds the
19 material breach? That is the same.

20 ARBITRATOR JENTES: Didn't it then go
21 to arbitration?

22 MR. VAN TOL: I believe it did.

23 ARBITRATOR JENTES: What I'm asking
24 about is, I keep coming back to whether or
25 not the arbitration clause is or is not

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2 binding, not the agreement as a whole.

3 MR. VAN TOL: The Ukrainian court
4 went out of its way to void both the
5 agreement and the arbitration clause.

6 ARBITRATOR JENTES: Again, I'm
7 putting aside for the moment, because I
8 know we are going to get back to the
9 decision by the Ukrainian court, but I am
10 just focusing, if I put that to the side
11 for a moment --

12 MR. VAN TOL: Here's my concern, and
13 this is really a concern that derives from
14 the fact that I might actually win. It
15 could happen that we could win. I'm
16 concerned that your award is going to be
17 unenforceable, because no matter what
18 happens in the United States, Mr. Sills
19 said at the last hearing when you asked
20 him, what are you going to do with this
21 award?

22 He said, I'm going to take it and I'm
23 going to enforce it in the Ukrainian.

24 We have attached to our experts
25 opinion, Professor Logush, a case on all

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2 fours. It is our case. A Ukrainian court
3 said invalid, a U.S. arbitration panel
4 ignored it, issued an award, the party
5 went back to enforce it in the Ukrainian
6 and the Court said strike it down.

7 I don't want to waste our client's
8 time, your valuable time, Mr. Sills' time
9 for something that might be a nullity
10 issue.

11 CHAIRMAN FEINBERG: Does your client
12 have assets in the United States?

13 MR. VAN TOL: I don't know the answer
14 to that. I don't believe Storm does.

15 CHAIRMAN FEINBERG: Does its parent
16 or any of its subsidiaries? I'm just
17 raising it, obviously.

18 MR. VAN TOL: The only subsidiary I'm
19 aware of in the United States is something
20 called Alpha Capital, which is like a
21 correspondent bank. It has nothing to do
22 with this transaction whatsoever. There
23 would be no nexus to the United States to
24 enforce an award.

25 ARBITRATOR JENTES: I diverted you

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2 from --

3 MR. VAN TOL: I think I have covered
4 all my points in probably a way that I
5 think is more satisfying to you.

6 ARBITRATOR JENTES: We have got to
7 get to the decisions by the Ukrainian
8 court.

9 ARBITRATOR CRAIG: Before we do that,
10 I have a couple of questions. Your answer
11 to my question about the ratification --

12 MR. VAN TOL: Oh, yes.

13 ARBITRATOR CRAIG: -- and approval of
14 the voting agreement as opposed to the
15 shareholders' agreement.

16 If you look at Exhibit C, in the
17 Myron Rabij exhibits, this is the English
18 translation of the notice regarding
19 resolutions adopted by written polling,
20 dated August 30th, 2002, which by the way
21 I guess was sent to Telenor.

22 And it shows that there is, and I go
23 to page two of that, resolutions approved
24 through written polling: One,
25 authorization, approval, ratification and

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2 confirmation of the following. C, is the
3 voting agreement --

4 MR. VAN TOL: Yes.

5 ARBITRATOR CRAIG: And H, by its very
6 terms, is the shareholders' agreement.

7 MR. VAN TOL: Yes.

8 ARBITRATOR CRAIG: How can you argue
9 that the ratification of the shareholders'
10 agreement didn't occur, particularly in
11 Exhibit D, which is the minutes of the
12 participants of the meeting that occurred
13 in October.

14 You go to item number seven, approval
15 of the resolutions adopted by written
16 polling on August 30th, 2002, and the
17 person who presented that to the
18 participants was a man by the name of
19 Nilov.

20 Now, it appears to me, and I, you may
21 know something I don't know, that these
22 two documents satisfy at least your
23 charter's obligations for the participants
24 to approve any kind of agreement of this
25 nature.

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2 MR. VAN TOL: Well, it can't because
3 they're talking about the form of the
4 draft that is attached to the voting
5 agreement, which we have just heard this
6 morning was not what was approved or,
7 sorry, was not what was signed in January
8 of 2004.

9 ARBITRATOR CRAIG: Understood. On
10 2004, there is a different modification,
11 but in 2002 was there not an approval and
12 modification of the shareholders'
13 agreement that was attached to the voting
14 agreement?

15 MR. VAN TOL: There was a
16 ratification of an agreement to be entered
17 into. It expressly says there that it's a
18 draft, to be entered into.

19 If you went to a court of law and
20 tried to enforce that, you would not be
21 able to. It's not an enforceable contract
22 and Telenor Mobile never argued it did.

23 What it does there is it's saying
24 this, in form, this looks like the kind of
25 transaction we want to do. But who knows,

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2 for whatever reason, say there were other
3 changes made that the Storm shareholders
4 didn't like, you would have Nilov acting
5 ultravirus based upon on a resolution that
6 was passed many months before about a
7 draft. I'm unaware of any authority to
8 support that concept.

9 ARBITRATOR CRAIG: Would you feel
10 that it's unfair for us to infer that
11 Mr. Nilov knew about the obligations to
12 have the participants ratify the
13 shareholders' agreement in 2004, since he
14 participated in precisely that process in
15 2002?

16 MR. VAN TOL: Mr. Nilov might have
17 thought exactly what you are suggesting.
18 He may have thought I'm fine, I have got
19 approval. That doesn't mean he did have
20 approval. That's the whole point of an
21 ultravirus act. An ultravirus act is not
22 an intentional, I'm going to ignore the
23 company's charter; I made a mistake.

24 ARBITRATOR CRAIG: But if Mr. Nilov
25 didn't know, how can you expect Telenor

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2 Mobile to know? Should have known is the
3 phrase, should have known. And your man
4 Nilov didn't know and was erroneous, how
5 can you hold Telenor responsible?

6 MR. VAN TOL: For the reasons I
7 suggested earlier. I asked Mr. Ekhougen
8 what went on, did your lawyers get a copy
9 of the charter? At a bare minimum, a
10 lawyer would look at that and say, a
11 corporate lawyer would look at it and say
12 I am not sure we have authority here.
13 Let's either get a resolution or an
14 express statement from Storm that charter
15 provision doesn't apply.

16 CHAIRMAN FEINBERG: But Storm has
17 lawyers, too, saying those things, and yet
18 the deal gets -- no one is arguing, I
19 don't think here, that the parties at the
20 time they made the deal didn't think there
21 was a deal. The parties who signed the
22 deal thought there was a deal.

23 MR. VAN TOL: I don't know what Storm
24 lawyers thought and saw --

25 CHAIRMAN FEINBERG: Did your client.

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2 MR. VAN TOL: -- in connection with
3 the January 2004 agreement, because the
4 Storm lawyer won't talk to us.

5 CHAIRMAN FEINBERG: Before, before we
6 ask to hear from Telenor, can we hear --
7 you may have other questions.

8 ARBITRATOR CRAIG: No, no. I'm fine.

9 CHAIRMAN FEINBERG: Can we hear a few
10 words from you on your best argument in my
11 opinion, which is why aren't they in the
12 Ukrainian courts? I think Bill referenced
13 that also. Do you want to respond to
14 that?

15 MR. VAN TOL: I do, but just quickly,
16 because I think I have articulated our
17 main points, which is let's go back to the
18 Sphere Drake standard. We have to go back
19 there.

20 You saw in our brief it has been
21 satisfied on what can be charitably
22 described as the loosest grounds
23 imaginable. Someone in a reply to a
24 demand says no, no contract. Someone puts
25 in a self-serving affidavit from somebody

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2 saying no meeting, no resolution.

3 Our affidavit isn't self-serving but
4 Mr. Klymenko and everyone else we have
5 talked to said they just have no evidence
6 of a meeting of participants. That what's
7 the Ukrainian court was looking at it.

8 CHAIRMAN FEINBERG: How do you know
9 that?

10 MR. VAN TOL: It says so. It says
11 there was no meeting of participants. It
12 had the two agreements there.

13 ARBITRATOR CRAIG: Did the Ukraine
14 court know about the 2002 ratification by
15 a meeting of participants?

16 MR. VAN TOL: I don't know. And I
17 have seen no evidence that it did.

18 But it also had second grounds, which
19 was apart from all that, this thing
20 doesn't comply with the formalities of
21 Ukrainian law. And I come back to the
22 point that I have never heard a good
23 articulation from Telenor Mobile of why on
24 earth they don't go to a court.

25 That's what Sphere Drake tells you.

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2 If you have got the slightest doubt about
3 whether or not there is an enforceable
4 contract, you have to go to court.
5 The last thing I will add on that is
6 it was interesting to see the cases.
7 There really is a standard for motion to
8 compel. Very high on Telenor. They have
9 to show that there is no issue of fact.
10 All these great questions that you
11 have all just asked me, they all have to
12 be resolved in Telenor Mobile's way in
13 order for you to go forward. If not, we
14 run an extreme danger, as I said, of being
15 in the Western NIS Fund case, where we go
16 through all this and find out it's
17 another.
18 And subject to answering questions
19 now or later, that's all I have by way of
20 summation.
21 ARBITRATOR JENTES: I have some
22 questions.
23 Let me deal with what happened before
24 the court of first instance in Ukraine.
25 When we were here the last time for

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2 oral argument and presentation, I was very
3 interested in trying to find out what was
4 the factual basis for the
5 findings/conclusions that the Court of
6 first instance came to.
7 And in response, you provided this
8 declaration of Ms. Khomyak --
9 MR. VAN TOL: Yes.
10 ARBITRATOR JENTES: -- and the
11 written file. And, in addition to that,
12 we got the affidavit of Mr. Klymenko.
13 Is that all the evidence that this
14 panel has of what was presented to the
15 Court?
16 MR. VAN TOL: Yes.
17 ARBITRATOR JENTES: Are you planning
18 to present anything more?
19 MR. VAN TOL: Other than -- and I
20 don't know how far to go on this. I can
21 submit affidavits from whomever I can find
22 involved in the transaction saying I am
23 unaware that there was a meeting of
24 participants because Mr. --
25 ARBITRATOR JENTES: No, no. I'm

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2 sorry.
3 MR. VAN TOL: Oh, about what happened
4 in the Ukrainian litigation?
5 ARBITRATOR JENTES: Only as to what
6 happened in the Ukrainian court.
7 MR. VAN TOL: Subject to there being
8 an affidavit from someone from Alperin,
9 although we have Alperin's statement of
10 claims, so we know what arguments they
11 made. I think this is it.
12 ARBITRATOR JENTES: Do we? We know
13 what the written thing was. Do we have
14 any knowledge at all as to what was said
15 at either the Court of first instance or
16 on appeal?
17 CHAIRMAN FEINBERG: Was there any
18 brief submitted?
19 MR. VAN TOL: No. Other than the
20 statement of claim, I'm unaware of
21 anything else.
22 ARBITRATOR JENTES: And we don't have
23 any evidence currently of what was said
24 during the, whatever it was, 15-minute
25 hearing the first time and the ten-minute

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2 hearing the second time?
3 MR. VAN TOL: We don't. And I don't
4 think we will. There is no transcript, is
5 that right? No court transcript is kept
6 in the Ukraine.
7 So what we do, what is interesting
8 about the Klymenko affidavit, is that he
9 raised an arbitration argument.
10 ARBITRATOR JENTES: No, no. I want
11 to come back to how many --
12 MR. VAN TOL: We know that, but we
13 know that he considered the issue of a
14 meeting of participants. We know that he
15 looked in the files and couldn't find
16 anything.
17 ARBITRATOR JENTES: I'm sorry. I
18 want to be very precise.
19 Do we have any other evidence of what
20 happened before the court at the trial on
21 the first instance or the appeal?
22 MR. VAN TOL: Subject to us
23 submitting something from Alperin, no.
24 ARBITRATOR JENTES: Who appeared, if
25 you know, at the trial in the first

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 2 instance other than Mr. Klymenko?
 3 MR. VAN TOL: No one other than
 4 Mr. Klymenko.
 5 ARBITRATOR JENTES: How about on
 6 behalf of the claimant?
 7 MR. VAN TOL: I think it was a
 8 layperson as well, Mr. Marchenko.
 9 ARBITRATOR JENTES: Who is
 10 Mr. Marchenko?
 11 CHAIRMAN FEINBERG: No. Excuse me,
 12 Mr. Sills. It wasn't Marchenko? You are
 13 nodding.
 14 MR. SILLS: I don't mean to
 15 interrupt.
 16 MR. VAN TOL: R.V. Marchenko.
 17 MR. SILLS: They were represented by
 18 counsel.
 19 MR. VAN TOL: Well, it says R.V.
 20 Marchenko, acting on the basis of a power
 21 of attorney. That is not a lawyer; that
 22 is a business person.
 23 MR. SILLS: I don't mean to
 24 interrupt, but in civil law countries, an
 25 attorney obtains a power of attorney to

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 2 the attachments to Ms. Khomyak's
 3 affidavit.
 4 MR. VAN TOL: Yes, I have it.
 5 ARBITRATOR JENTES: Okay. Am I
 6 correct that if you look at tab three, got
 7 that one?
 8 MR. VAN TOL: Yes.
 9 ARBITRATOR JENTES: Is that the order
 10 that the single judge issued when the
 11 proceeding was started?
 12 MR. VAN TOL: That's my
 13 understanding.
 14 ARBITRATOR JENTES: And if I look
 15 back at tab two, is that the order that
 16 was apparently dated April 17 of 2006?
 17 MR. VAN TOL: I don't know. I don't
 18 see a date on what's in tab three, so I
 19 don't know.
 20 ARBITRATOR JENTES: No, I didn't
 21 either, but it looks to me like it's the
 22 first document.
 23 MR. VAN TOL: It should be because of
 24 the title, yes.
 25 ARBITRATOR JENTES: About halfway

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 2 act on behalf of a client. He is, in
 3 fact, a member of Magister and Partners,
 4 which is regular counsel for Storm.
 5 MR. O'DRISCOLL: It is a law firm.
 6 MR. SILLS: I'm sorry. I didn't mean
 7 to interrupt.
 8 MR. VAN TOL: Every hearing we get
 9 evidence from Telenor Mobile which is not
 10 evidence.
 11 ARBITRATOR JENTES: That's why I am
 12 directing my questions to you.
 13 As far as you know, was there anybody
 14 other than Mr. Marchenko there?
 15 MR. VAN TOL: Not that I know.
 16 ARBITRATOR JENTES: Who is
 17 Mr. Marchenko, as far as you know?
 18 MR. VAN TOL: I don't know.
 19 ARBITRATOR JENTES: Do we have any
 20 evidence that you know of as to who he
 21 was?
 22 MR. VAN TOL: Not other than what I
 23 have heard today, if that's evidence. I
 24 don't know who he is.
 25 ARBITRATOR JENTES: Could you look at

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 2 down the judge has got an indication that
 3 there is an order obliging the claimant to
 4 provide the Court with a written
 5 confirmation that no commercial court or
 6 another authority, et cetera, is doing
 7 anything.
 8 Do you have any idea or knowledge as
 9 to why the judge asked that?
 10 MR. VAN TOL: My understanding is,
 11 and again as Mr. Sills has already said,
 12 I'm not a Ukrainian law expert. We asked.
 13 The Court has to satisfy there is no other
 14 body, jurisdiction such as an arbitration
 15 panel, that could hear the claim, which is
 16 why Mr. Klymenko raised the fact that
 17 there was an arbitration going on.
 18 ARBITRATOR JENTES: But this is
 19 directed to the claimant.
 20 MR. VAN TOL: I understand. But it's
 21 also the claimant's ability, as there is
 22 in this jurisdiction, for them to say I
 23 don't think this arbitration tribunal has
 24 any authority over the issues. They are
 25 Ukrainian law issues.

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2 This arbitration is not about whether
3 or not the contract at the time, is the
4 contract is valid under Ukrainian law;
5 that is an issue of contract formation for
6 Ukrainian courts.

7 ARBITRATOR JENTES: Well, let me ask
8 you to turn over to, I guess it's tab 20.

9 MR. VAN TOL: And, also, I am sorry.
10 Mr. Chang pointed out if I could go back,
11 it says it's considering the case between
12 the same parties under the same cause of
13 action, that's obviously not, Alperin is
14 not a party to the arbitration agreement.

15 ARBITRATOR JENTES: Now, could you
16 look at tab 20.

17 Am I correct that this was a
18 so-called application that was submitted
19 by Mr. Marchenko to the trial court, court
20 of first instance on April 21 of 2006?

21 MR. VAN TOL: Yes.

22 ARBITRATOR JENTES: And in that he
23 makes a series of statements, the first of
24 the which is that, quote, claimant is not
25 aware of any cases relating to this case,

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2 which are pending before any bodies
3 authorized to consider commercial
4 disputes, or competent bodies, period, end
5 of quote.

6 Do you have any idea why
7 Mr. Marchenko made that statement to the
8 trial court?

9 MR. VAN TOL: Not directly. My
10 supposition would be just as I gave you.

11 ARBITRATOR JENTES: But it doesn't
12 limit it to just parties.

13 MR. VAN TOL: My answer went beyond
14 who the parties are. My answer goes to is
15 the matter before the court something that
16 is subject to an arbitration? It's not
17 under any version of Ukrainian law. It's
18 something to be decided by Ukrainian
19 courts; that's our whole point.

20 ARBITRATOR JENTES: We are going to
21 have a difference as to what this says,
22 but --

23 MR. VAN TOL: In good faith a
24 Ukrainian lawyer could say to the
25 Ukrainian court, there is no competent

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2 body out there hearing this issue that I
3 raised before you. There wasn't. We
4 weren't saying anything to this tribunal
5 at all yet. There was no meeting of
6 participants. That issue is before the
7 Ukrainian court, not this panel.

8 ARBITRATOR JENTES: The second
9 statement, is, quote, the parties have not
10 entered into an arbitration agreement with
11 respect to this dispute, period, end of
12 quote.

13 MR. VAN TOL: Same point. It goes to
14 your question, what you were asking
15 earlier about severability. We would say
16 not severable, because of its inherent in
17 the contract, you do not arbitrate the
18 question of contract formation.

19 ARBITRATOR JENTES: Interesting.

20 MR. VAN TOL: But I would submit, and
21 I know you know this, I would submit that
22 any question on that account was clearly
23 dealt with by the Ukrainian courts,
24 because of Mr. Klymenko raised it.

25 He said, what about this arbitration

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2 agreement? And as a non-lawyer he
3 probably thought, it looks like its
4 something to be arbitrated and the Court,
5 competent to hear that, rejected that
6 argument.

7 ARBITRATOR JENTES: Well, let me get
8 to that. If you go to Mr. Klymenko's
9 affidavit --

10 MR. VAN TOL: Yes.

11 ARBITRATOR JENTES: In paragraph six,
12 he says at the hearing, and he is
13 referring to the April 25th, 2006,
14 hearing, quote, I also informed the Court
15 of the existence of the New York
16 arbitration proceedings, which were
17 already underway.

18 Do you know what he said?

19 MR. VAN TOL: I don't.

20 ARBITRATOR JENTES: Did you ask him?

21 MR. VAN TOL: We asked him whether or
22 not, what arguments he made, and he said
23 he made the argument that there was an
24 ongoing arbitration, and it should be
25 arbitrated.

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2 ARBITRATOR JENTES: Well, did you ask
3 him whether or not he told the Court of
4 the contentions and positions that had
5 been taken by Telenor in the New York
6 arbitration?

7 MR. VAN TOL: I don't know that. All
8 the court would have had would have been
9 the arbitration clause, itself, which it
10 could adjudge for itself.

11 ARBITRATOR JENTES: As far as you
12 know, it didn't know anything at all about
13 what was actually being argued and
14 presented to this panel?

15 MR. VAN TOL: What I have to said is
16 I don't know the answer one way or
17 another.

18 ARBITRATOR JENTES: Do you know
19 whether Mr. Marchenko said anything at all
20 about the New York proceeding during the
21 April 25th, 2006, hearing?

22 MR. VAN TOL: I don't know that.

23 While we are on the Klymenko
24 affidavit, it's appropriate, I should
25 point out that we did submit an errata

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2 Mr. Marchenko would have told the Court, I
3 don't know what he could have told the
4 Court other than a panel has been
5 convened, there has been an organizational
6 telephone meeting and there is going to be
7 a hearing on jurisdictional grounds, which
8 I think by that point were waiver and
9 estoppel, and the focus was not yet on
10 Ukrainian court decisions because we
11 didn't have them yet.

12 ARBITRATOR JENTES: But by that time
13 there was a demand for arbitration that
14 was about an inch thick, and I take it
15 that Mr. Klymenko had that document?

16 MR. VAN TOL: I don't know if he did.
17 I am trying to remember how he was
18 informed that there was an ongoing
19 arbitration. Maybe through that document.
20 He knew that there was an ongoing
21 arbitration obviously, because that's why
22 he raised the argument.

23 ARBITRATOR JENTES: In any event, he
24 chose not to make a written presentation
25 to the Court, the trial court?

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2 sheet. We just had a typo. At the end,
3 Mr. Klymenko meant to say that he had no
4 contact with Alperin, otherwise it doesn't
5 make sense.

6 ARBITRATOR JENTES: Sure.

7 I take it from the completeness of
8 the set of documents that are attached to
9 Ms. Khomyak's affidavit, that no documents
10 were submitted to the court of first
11 instance in the Ukraine relating to the
12 New York arbitration and this panel's
13 activities?

14 MR. VAN TOL: I don't think there
15 was, but I believe at the time of
16 April 21st, 2006, I am trying to remember
17 where we were in procedural posture. I
18 don't think, I don't think Storm had yet
19 argued that there was -- that the case
20 should be dismissed on the grounds that
21 there was a -- or couldn't have argued
22 that the case should be dismissed on the
23 grounds that there was a prior Ukrainian
24 ruling, because there wasn't one yet.

25 So, reverting back to what

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2 MR. VAN TOL: That is correct. He
3 did choose not to make a written
4 presentation.

5 ARBITRATOR JENTES: And he chose not
6 to present any of the documents that were
7 then extant in this New York arbitration?

8 MR. VAN TOL: Not exactly.

9 The voting agreement and
10 shareholders' agreement were already
11 before the Ukrainian court. Those are
12 documents in this case.

13 ARBITRATOR JENTES: Oh, no. I meant
14 he didn't submit the demand for
15 arbitration, for example.

16 MR. VAN TOL: I didn't see any
17 evidence that he did.

18 ARBITRATOR JENTES: After the first
19 hearing, did he come forward with any
20 other filings with the Court, as far as
21 you know, that related to this
22 arbitration?

23 MR. VAN TOL: No.

24 ARBITRATOR JENTES: So, by the time
25 that the issues related to jurisdiction

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2 that had been raised by your firm, he
3 didn't bring that to the attention of the
4 courts in the Ukraine?

5 MR. VAN TOL: Not to my knowledge.
6 But I don't know what he said at the oral
7 argument. He definitely -- in fact, he
8 made the arguments about the -- that was
9 the focus of the appeal. So, it could
10 have come up. I just don't know, absent a
11 transcript.

12 ARBITRATOR JENTES: In paragraph
13 eight of his affidavit, he said that he
14 had not been told by anyone at Storm that
15 there was a meeting of participants
16 granting Mr. Nilov that required
17 authority, as such I did not rely on this
18 argument at either the April 2006 hearing
19 or at the May 2000 hearing, and instead
20 focused on the jurisdictional argument.

21 MR. VAN TOL: Yes.

22 ARBITRATOR JENTES: So far as you
23 know, that's an accurate statement?

24 MR. VAN TOL: So far as I know.

25 ARBITRATOR JENTES: So, he didn't

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2 raise any of the factual materials that we
3 have heard today by way of the testimony
4 live, nor did he present to the Court in
5 the Ukraine any of the written materials
6 that you have and Mr. Sills presented to
7 the panel?

8 MR. VAN TOL: I'm sorry to answer it
9 this way, but I have to qualify it.

10 Mr. Klymenko was focused on the
11 meeting of participants for the
12 shareholders' agreement, so that would not
13 necessarily lead him to documents relating
14 to the voting agreement.

15 ARBITRATOR JENTES: I'm only trying
16 to find what got to the court in the
17 Ukraine, that is the courts in the
18 Ukraine. And I take it they didn't have
19 any of the materials that this panel has
20 been considering that was submitted by you
21 and Mr. Sills?

22 MR. VAN TOL: Other than the signed
23 voting agreement and the signed
24 shareholders' agreement, no.

25 ARBITRATOR JENTES: Okay. When

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2 Mr. Klymenko says in paragraph eight that
3 he hadn't been told by anyone at Storm
4 that there was a meeting of participants
5 granting Mr. Nilov the required authority,
6 do you know who Mr. Klymenko talked to at
7 Storm about that?

8 MR. VAN TOL: I don't know that.

9 ARBITRATOR JENTES: Do you know
10 whether he ever talked to Mr. Nilov?

11 MR. VAN TOL: I don't know. I don't
12 think Mr. Nilov was at Storm then, but I
13 don't know.

14 ARBITRATOR JENTES: Do you know
15 whether he ever talked to Mr. Wack?

16 MR. VAN TOL: I don't know that
17 either. He probably would have gotten the
18 response we got.

19 ARBITRATOR JENTES: That's all the
20 questions I have.

21 ARBITRATOR CRAIG: When did your law
22 firm first learn about the action brought
23 by Alperin against Storm in the Ukraine
24 court?

25 MR. VAN TOL: I don't know. It was

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2 around the time of the telephone
3 conference.

4 I didn't participate in it, Mr. Sear
5 did. If you know the date of that, it was
6 around then; that's all I know.

7 MR. SILLS: It was April 14th.

8 MR. VAN TOL: Of the Alperin action?

9 ARBITRATOR CRAIG: Yes. Of the
10 Alperin action.

11 MR. VAN TOL: That's my
12 understanding. It was around then,
13 precisely when, I don't know.

14 ARBITRATOR CRAIG: So, for purposes
15 of our understanding when Lovells learned
16 about this action, we could say it was
17 before April 25th; is that correct?

18 MR. VAN TOL: I think that's fair,
19 yes.

20 ARBITRATOR CRAIG: Did anyone in your
21 law firm communicate with Storm's counsel
22 in Kiev or Mr. Klymenko about this cause
23 of action in the Ukraine?

24 MR. VAN TOL: Not to my knowledge. I
25 didn't.

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2 ARBITRATOR CRAIG: Did you discuss
3 this cause of action with anybody at Storm
4 in April?

5 MR. VAN TOL: Maybe I misunderstand
6 your question. Which cause of action,
7 this arbitration?

8 ARBITRATOR CRAIG: No, the Alperin
9 cause of action.

10 MR. VAN TOL: Yes, we must have, yes.
11 Again, I apologize, my participation
12 started, unfortunately for me, mid May
13 2006 or at least early May.

14 CHAIRMAN FEINBERG: Okay. Mr. Sills,
15 you might start off --

16 MR. SILLS: Before we do that, could
17 we have a five-minute recess?

18 CHAIRMAN FEINBERG: Yes. That's a
19 very good idea. We will take a ten-minute
20 break and then reconvene.

21 Mr. Sills, you might start off after
22 the ten-minute break, by simply explaining
23 why, instead of making these arguments to
24 us, even today you are not making these
25 arguments to a Ukrainian court.

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2 And what it says is this: Except for
3 arbitration proceedings pursuant to
4 Section 12.01A, no action, lawsuit or
5 other proceeding, other than the
6 enforcement of an arbitration decision, an
7 action to compel arbitration or an
8 application for interim, provisional or
9 conservatory measures in connection with
10 the arbitration, shall be brought by or
11 between the parties in connection with any
12 matter arising out of or in connection
13 with this agreement.

14 As you know from the steelworkers
15 trilogy, that is the broadest possible
16 arbitration clause.

17 So, I suppose there are really
18 several questions. Why did we come here?
19 Because we agreed to come here.

20 And I suppose in some sense no good
21 deed goes unpunished, but by bringing to
22 this tribunal this dispute, we have
23 honored the agreement that we had signed.

24 Now, looking back to Section 12.01A,
25 the parties accepted the Uncitral rules to

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2 MR. SILLS: That's exactly where I am
3 going to start.

4 (Recess taken.)

5 MR. SILLS: Thank you, Mr. Chairman.
6 Let me turn to the question that you
7 raised just before the recess.

8 And because I think it will be
9 helpful to look at the actual words of the
10 governing rules, I would like to hand to
11 the panel, and of course to Mr. Van Tol,
12 copies of the Uncitral rules that govern
13 this proceeding, because I will be
14 referring to them.

15 And I have marked with a green flag
16 the particular provision that I will be
17 discussing.

18 Let me begin first though,
19 Mr. Chairman, with the language of the
20 contract that the parties signed and this
21 is, after all, a case about enforcing the
22 written undertakings of commercial
23 parties. And turn particularly to Article
24 12, the disputes resolution provision, and
25 let me begin at 12.01B of the contract.

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2 govern this proceedings.

3 I don't think there could be any
4 serious dispute that in the Second Circuit
5 and in New York, as in every other court
6 in the United States, when there is a
7 reference to the rules of a particular
8 arbitration association, that incorporates
9 by reference of those rules in the
10 contract as if they had been set out
11 verbatim.

12 The best recent case I know of on
13 that is the decision of the Second Circuit
14 in the Shaw Group versus Triplefin
15 International which appears at 322 Fed 3d.
16 115. Because this question hadn't been
17 raised previously, we had to address this
18 in our papers, but I do have copies of
19 that as well for the tribunal and a copy
20 for Mr. Van Tol. But I think that is sort
21 of common currency in the world of
22 arbitration.

23 That being said, I would like to turn
24 to the Uncitral rules and, in particular,
25 to Article 21, Subsection two.

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2 What it says is this: The arbitral
3 tribunal shall have the power to determine
4 the existence or the validity of the
5 contract of which an arbitration clause
6 forms a part. For the purposes of Article
7 21, an arbitration clause which forms a
8 part of a contract and which provides for
9 arbitration under these rules shall be
10 treated as an agreement independent of the
11 other terms of the contract.

12 A decision by the arbitration
13 tribunal that the contract is null and
14 void shall not entail ipso jure the
15 invalidity of the arbitration clause.

16 That goes well beyond the Prima Paint
17 principle that governs all arbitrations
18 being conducted in the United States.
19 This is the deal that the parties made.
20 The agreement was that the arbitration
21 clause would be treated as severable.

22 In effect, it's as if Mr. Nilov had
23 signed a separate document agreeing to
24 arbitrate the dispute over the validity of
25 the contract, and if he had done that, if

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2 those were formal steps that had been
3 taken, I think not even Storm would have
4 challenged that.

5 But that's what this says. This says
6 that the arbitration clause is fully
7 severable, that the arbitration clause is
8 a separate agreement.

9 It is impossible to point to any
10 provision of Ukrainian or other law that
11 would prevent Mr. Nilov from agreeing on
12 behalf the company to arbitrate a dispute,
13 and under this express language, this
14 tribunal and not a court, has the power to
15 determine its own jurisdiction, including
16 the question of whether the contract of
17 which the arbitration clause forms a part
18 is, itself, valid.

19 CHAIRMAN FEINBERG: Let me ask you
20 something. What happens if we agree with
21 you and we find jurisdiction, now what?

22 MR. SILLS: Then we will move forward
23 on the merits.

24 CHAIRMAN FEINBERG: You will?

25 MR. SILLS: I would hope so.

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2 CHAIRMAN FEINBERG: Let's say you
3 move forward on the merits, then what?

4 MR. SILLS: Well, we anticipate
5 winning.

6 CHAIRMAN FEINBERG: Then what?

7 MR. SILLS: Then we would seek to
8 enforce that award.

9 CHAIRMAN FEINBERG: Where?

10 MR. SILLS: Well, I think we would
11 initially try to enforce it in the
12 Ukraine. You raised this question before
13 and we have heard constantly from Storm
14 that it will attempt to thwart any award
15 in the Ukraine.

16 I think there are two answers.
17 First, Ukraine is a party to the New York
18 Arbitration Convention, it is a party to
19 the Inter European Arbitration Convention,
20 which in some ways is even stronger, and
21 it has recently adopted a domestic law
22 providing for the enforcement of foreign
23 arbitral awards. All those are referred
24 to in our previous papers.

25 I'm not -- and I believe also

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2 Ukraine, Ukraine's post-Soviet history
3 isn't 20 years old. It's a developing
4 legal culture. Will they enforce it? I
5 would hope so.

6 Do we have treaty and statutory
7 grounds on which we could attempt to
8 enforce it? Yes.

9 Are there diplomatic channels
10 available for attempting to enforce an
11 award in favor of a Norwegian company in
12 the Ukraine? There are.

13 If we lose, if Storm, in effect,
14 having agreed to arbitrate, says we didn't
15 really mean it because you can't enforce
16 an award against us, we would then seek to
17 enforce it against the assets of the Alpha
18 Group outside of Ukraine as you suggested
19 in one of your questions. I hope it won't
20 come to that, but I think we have plenty
21 of resources.

22 Do they have funds in the United
23 States? They do. Do they have assets in
24 the United States and elsewhere in Europe?
25 They do.

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2 But I don't think it really comes
3 fairly from Storm. For Storm to assert
4 that, having agreed to arbitrate, having
5 agreed to arbitrate in New York under New
6 York law, under the broadest possible
7 arbitration clauses we have just been
8 discussing, that it's all a meaningless
9 gesture because they intend to resort to
10 the Ukraine courts.

11 I have been doing this 30 years and
12 my ability to predict how a court will
13 act, even here in New York where I am
14 licensed, has turned out to be less than
15 perfect over time.

16 I don't think either Mr. Van Tol or I
17 is in a position to predict how a
18 Ukrainian court would deal with an award
19 from this tribunal a year or two from now.
20 Especially, given the fact that Ukrainian
21 legal culture, as I understand it, is very
22 much in flux.

23 CHAIRMAN FEINBERG: I take it you are
24 somewhat reluctant, obviously, that's
25 putting it mildly, to resolve this claim

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2 now in the Ukrainian courts?

3 MR. SILLS: Well, I would be
4 reluctant to do that for several reasons.

5 First, that is not the deal parties
6 made. And Telenor at least is attempting
7 to abide by the agreement it made; that
8 this tribunal, here in New York, under New
9 York law is the appropriate forum.

10 And the fact that Storm violated the
11 agreement and has sought recourse in
12 Ukraine by our count nine times in a
13 variety of different procedural modes,
14 trying to attack the agreements it made,
15 doesn't mean that we should, in effect,
16 take the bait, go to Ukraine, and then
17 have them come here and say, see, they
18 have waived their right to arbitrate.
19 That is getting the case backward.

20 I think also the parties, when you
21 read the agreement, and I can't speak or
22 speculate about Storm or Alpha's motives.

23 The parties didn't have confidence in
24 Ukrainian justice, that is why they
25 elected arbitration in New York, and

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2 that's why they designated the federal and
3 state courts in New York City are the only
4 courts mentioned here, as the courts to
5 which they would submit in the event there
6 was a dispute outside the scope or outside
7 the competence of the arbitrable tribunal.

8 If we have had to, we would resort to
9 the Southern District. I don't want to
10 attempt to mislead the tribunal.

11 We do have concerns about Ukrainian
12 justice and about the courts of justice in
13 Ukraine. And I think the questions
14 Mr. Jentes was addressing, albeit
15 unanswered, concerning this proceeding or
16 so-called proceeding in Ukraine, which
17 seems to be the centerpiece now of the
18 motion to dismiss, although that motion
19 has certainly morphed over time,
20 highlights some of the problems. The
21 hearing lasted, at most, 15 minutes.

22 CHAIRMAN FEINBERG: Were you there?

23 MR. SILLS: I was not there. I heard
24 Mr. Jentes referring to it.

25 CHAIRMAN FEINBERG: Was Telenor at

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2 that meeting?

3 MR. SILLS: Telenor was not there
4 because we had no notice. Telenor was not
5 a party to that proceeding. That seems to
6 have been lost in the shuffle somehow in
7 the discussion.

8 Not only was Telenor not a party,
9 Telenor wasn't even notified after it was
10 begun. I think Mr. -- implicit in
11 Mr. Craig's questions -- in fact, we
12 weren't notified after this first
13 so-called victory of Storm. We learned
14 from a press release that a Ukrainian
15 court had granted this wide-ranging
16 relief. And when I look at the papers
17 which have now finally been supplied,
18 which seem to constitute the records in
19 that case, the defense such as it is, is
20 put on by a layman.

21 We are not questioning that he had a
22 legal right to represent Storm. Storm
23 seems to have done, to say the least, very
24 little to defend its own agreement in that
25 Ukrainian court.

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<p>1 Proceedings</p> <p>2 They sent a layman. He showed up.</p> <p>3 He didn't put anything in writing. He</p> <p>4 mentioned the fact that there was an</p> <p>5 arbitration, lost on what appears to be a</p> <p>6 decision that goes well beyond the scope</p> <p>7 of the pleadings. The pleadings all seem</p> <p>8 to have to do with the claim that the --</p> <p>9 that the agreement should have been in</p> <p>10 Ukrainian and should have been filed.</p> <p>11 Now, Mr. Klymenko, you would think,</p> <p>12 would have known there was an executed</p> <p>13 Ukrainian copy of this document, but he</p> <p>14 didn't mention that.</p> <p>15 You would have that, given the fact</p> <p>16 that he is the general director of the</p> <p>17 company, that he would somehow have</p> <p>18 control over his own company's books and</p> <p>19 records, but he didn't know there was a</p> <p>20 2002 meeting.</p> <p>21 He doesn't seem to have mentioned the</p> <p>22 fact that certificates attesting to the</p> <p>23 actual authority of his predecessor, Mr.</p> <p>24 Nilov, to execute this agreement, was</p> <p>25 supplied in order to give comfort to</p>	<p>1 Proceedings</p> <p>2 Telenor that this agreement had been duly</p> <p>3 executed.</p> <p>4 He didn't seem to mention the fact</p> <p>5 that, although they claim to -- this is</p> <p>6 reflected in the transcript of the last</p> <p>7 hearing, the June 29th hearing. The claim</p> <p>8 was that this alleged infirmity in the</p> <p>9 execution of the contract was discovered</p> <p>10 in 2005, but they didn't crank up this</p> <p>11 lawsuit until, I believe, April 2006 and</p> <p>12 didn't announce it until Ukrainian justice</p> <p>13 had run its course towards the end of May</p> <p>14 2006.</p> <p>15 He didn't mention the fact that they</p> <p>16 had waited apparently about a year before</p> <p>17 even commencing this proceeding.</p> <p>18 They never mentioned the fact that</p> <p>19 there was an ongoing proceeding in New</p> <p>20 York in which jurisdictional questions had</p> <p>21 been raised by Storm, I believe on the</p> <p>22 same day that they commenced this</p> <p>23 proceeding in Ukraine and represented to</p> <p>24 the Ukraine court that there were no</p> <p>25 related proceedings.</p>
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<p>1 Proceedings</p> <p>2 And the fact is, and I don't think</p> <p>3 this is without real force, Alperin is the</p> <p>4 parent of Storm. Storm is not an</p> <p>5 operating company. Mr. Marchenko does</p> <p>6 appear on the internet as a Ukrainian</p> <p>7 lawyer.</p> <p>8 Storm is one of his regular clients.</p> <p>9 The fact is Storm was sued by itself.</p> <p>10 This is a dog chasing its tail. And the</p> <p>11 notion that a carefully negotiated</p> <p>12 agreement, involving billions of dollars</p> <p>13 in assets, should be upset because of such</p> <p>14 an absurd case, if it weren't so serious,</p> <p>15 and if there weren't so much at stake, I</p> <p>16 think would be laughable.</p> <p>17 CHAIRMAN FEINBERG: And the reason, I</p> <p>18 take it, once you learned of the lawsuit</p> <p>19 you didn't the next day run in the</p> <p>20 Ukrainian courts is why?</p> <p>21 MR. SILLS: Well, we didn't run for</p> <p>22 several reasons. First, there had already</p> <p>23 been an appeal, and as I understand</p> <p>24 Ukrainian procedures, as would be the</p> <p>25 case, assuming you could intervene on</p>	<p>1 Proceedings</p> <p>2 appeal in a case here in the United</p> <p>3 States, you are stuck with the record that</p> <p>4 has been made in the Court below.</p> <p>5 I mean, if you were to intervene in</p> <p>6 an American case following an appeal,</p> <p>7 assuming there were a vehicle for doing</p> <p>8 that and it's not entirely clear that we</p> <p>9 could. But assuming that is true, you</p> <p>10 couldn't make a new record.</p> <p>11 Appellate courts, let alone the</p> <p>12 supreme court, or the higher commercial</p> <p>13 court of Ukraine, are not places in which,</p> <p>14 as I understand it, you could make a new</p> <p>15 record.</p> <p>16 ARBITRATOR JENTES: Even though you</p> <p>17 weren't present?</p> <p>18 MR. SILLS: That's my understanding.</p> <p>19 ARBITRATOR CRAIG: Even though you</p> <p>20 were in possession of a lot of evidence</p> <p>21 that had not been brought to the attention</p> <p>22 of the Ukrainian court?</p> <p>23 MR. SILLS: I don't believe there is</p> <p>24 a procedural vehicle in Ukraine for</p> <p>25 introducing that new evidence, and I am</p>

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2 quite certain we would have been met with
3 an objection, just as you heard that we
4 would now be told if we tried to intervene
5 that we had somehow waived our rights.

6 CHAIRMAN FEINBERG: And you didn't
7 contemplate a new lawsuit?

8 MR. SILLS: I want to be frank about
9 that, Mr. Feinberg.

10 If we were to contemplate a new
11 lawsuit, we would resort to an American
12 court, as the parties agreed we could in
13 the shareholders' agreement. It expressly
14 provides for jurisdiction in New York, in
15 federal or state court. It's in Article
16 12.01 -- excuse me. It's in Article 12.2.

17 CHAIRMAN FEINBERG: And I take it
18 that, at least in part, Mr. Sills, and I
19 don't think you have made this argument
20 quite as directly in the past, but if I
21 hear you correctly, and correct me, I'm
22 not trying to put words in your mouth.

23 You raise here with this tribunal
24 some question about the credibility or
25 legitimacy of the Ukrainian civil justice

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2 asset stripping and voting fraud.

3 "Corruption lies at the heart of many
4 investor disputes. Laws and regulations
5 are vague, with considerable room for
6 interpretation, providing officials at
7 every bureaucratic layer ample
8 opportunities for corruption. Dispute
9 settlement remains weak. U.S. businesses
10 consider the local and national court
11 systems unpredictable and try to avoid
12 them."

13 ARBITRATOR JENTES: What is that
14 document?

15 MR. SILLS: It's an official State
16 Department document called Doing Business
17 in Ukraine, a country commercial guide for
18 U.S. companies. It's available on the
19 State Department Web site.

20 ARBITRATOR JENTES: What is the date
21 of it?

22 MR. SILLS: According to the one I
23 have before me, February 8, 2005.

24 ARBITRATOR JENTES: Okay.

25 MR. SILLS: And as -- I'm sorry.

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2 system?

3 MR. SILLS: I want to speak carefully
4 to this point, because there are many
5 courts in Ukraine and many judges, just as
6 there are anywhere else.

7 The cases, the relentless barrage of
8 litigation to which my client has been
9 subjected in the Ukraine on these issues,
10 does very little to inspire confidence in
11 the Ukrainian judicial system.

12 I can tell what the State Department,
13 in its official publication about Ukraine,
14 it's called Doing Business in Ukraine, and
15 it's available on the State Department Web
16 site, has to say about this. This is a
17 quote.

18 "Frequently investment disputes
19 involve the lack of adequate rule of law,
20 fair and impartial dispute resolution
21 mechanisms, enforcement of domestic court
22 and international arbitration decisions.

23 "Another problem is poor corporate
24 governance, inadequate protection for
25 shareholder rights, inadequate disclosure,

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2 ARBITRATOR JENTES: Go ahead.

3 MR. SILLS: Well-recognized
4 international agencies, such as
5 Transparency International, of which I am
6 sure the panel is familiar, have regularly
7 criticized the quality of justice in
8 Ukraine.

9 Are there exceptions to that rule?
10 Quite possibly.

11 Is it legitimate for the parties to
12 have concluded that, given these types of
13 concerns, would agree on arbitration?
14 They would agree on the broadest possible
15 arbitration? That they would agree on a
16 mature legal regime, the laws of New York
17 as opposed to a developing legal regime,
18 the laws of Ukraine?

19 Those are all rational business
20 decisions and that's the deal the parties
21 made.

22 So, I suppose that other parties
23 might decide that resort to the Ukrainian
24 court system was a perfectly sound thing
25 to do. That is not the agreement that the

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2 parties reached here. The agreement that
3 the parties reached was that it would be
4 arbitrated and, by incorporation of the
5 Uncitral rules, agreed that even the
6 question of the existence of validity of
7 the contract would be arbitrated, because
8 of the severability provision in Article
9 21 of the Uncitral rules.

10 And I think that is common currency.
11 In international arbitration, it's common
12 for an arbitral tribunal, under the
13 Uncitral rules, or equally common under
14 the ICC rules which has a similar
15 provision, to have jurisdiction to
16 determine its own jurisdiction.

17 ARBITRATOR JENTES: That's a little
18 different, as you well know.

19 But let me get back to the Second
20 Circuit's decision in the Sphere Drake
21 case that we keep returning to.

22 How do you get around what appears to
23 be the language of the Court that says,
24 both under the Federal Arbitration Act and
25 under the New York convention, it's the

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2 court that has to decide and, in fact, has
3 to give the party who is opposing the
4 contractual arrangement a trial, and at
5 least in that decision, a trial by jury
6 where the contention is made that it, that
7 the agreement is -- the overall agreement
8 is null and void.

9 How do we get around that?

10 MR. SILLS: Around that, excuse me.
11 We get around it because the rules that
12 govern the Sphere Drake arbitrations are
13 different rules, because they don't have
14 the severability clause, because as the
15 case I just distributed says, there is a
16 presumption that the parties don't
17 delegate to the arbitrators the type of
18 decision that is put before you on this
19 motion, but the parties can agree to that.

20 And I think the way to think about it
21 is that assume --

22 ARBITRATOR JENTES: Let me only ask,
23 interrupt in this respect. Is there any
24 case that supports what you just said?

25 MR. SILLS: Yes, there are. There

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2 are numerous cases. And, in fact -- I
3 apologize for the pile of paper here --
4 the case that I just distributed provides
5 exactly that.

6 The case is cited at pages 22 and 23
7 of our initial brief in opposition to this
8 motion.

9 ARBITRATOR JENTES: Where in the case
10 that you just cited, the Shaw Group, does
11 it say what you said, which I gather is
12 that notwithstanding what it says in the
13 Federal Arbitration Act and the New York
14 convention, that if there is a
15 severability clause, that we can, in
16 effect, take over the ruling on the null
17 and void issue?

18 MR. SILLS: If you bear with me one
19 second.

20 ARBITRATOR JENTES: Sure. Because I
21 think this is something, in fairness, this
22 is something the panel is very much
23 interested in hearing what the law has to
24 say.

25 MR. SILLS: I think the discussion

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2 begins on page seven of the version we
3 gave out and continues over with a long
4 discussion of cases, from the Second and
5 other circuits, including Apollo Computer,
6 in which the presumption is against
7 arbitrators ruling on their own
8 jurisdiction, which I would agree is part
9 of the usual jurisprudence under both the
10 Arbitration Act and the New York
11 Arbitration Convention, can be overcome.

12 And that's the way in which this
13 court, this opinion we have before us, is
14 reading the First Options decision, Judge
15 Breyer's opinion in First Options in the
16 Supreme court.

17 And I suppose the way to think about
18 it is this: If, after this dispute had
19 arisen, we had approached Storm and we had
20 said we think the right way to get this
21 question resolved is to arbitrate it in
22 New York, and they had signed a separate
23 agreement providing for the question of
24 the validity of the contract to be
25 arbitrated in New York, that would be

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2 enforceable.

3 Arbitrators rule all the time under
4 such submissions, and I don't think there
5 could be any serious suggestion that the
6 parties couldn't agree to submit the
7 question of the validity of the contract
8 to an arbitrable tribunal.

9 The way in which this contract was
10 drafted and agreed to by the parties
11 provides for exactly that, because Article
12 21.2 of the Uncitral rules makes that
13 arbitration clause severable and
14 specifically enforceable, and that's --
15 arbitration is, after all, and that's --
16 arbitration, after all, is a matter of
17 contract. This is the contract the
18 parties made.

19 The parties agreed to this clause.
20 Unless we are yet again hearing that Storm
21 agreed to something, in effect, with its
22 fingers crossed behind its back because
23 they didn't really mean it. Because
24 that's what the Uncitral rules said at the
25 time this contract was signed and that's

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2 this self-inflicted wound in the Ukraine
3 might have to the Ukraine. But we don't
4 have to go that far.

5 Arbitration clauses are typically
6 regarded as severable, ever since the
7 Supreme Court's decision in Prima Paint.
8 The Uncitral rules make it express that
9 it's severable and they go beyond making
10 it simply severable, in the sense that the
11 arbitrators can't reach, under ordinary
12 severability principles, the question of
13 the validity of the contract in which the
14 arbitration clause is set forth.

15 Here the parties expressly agreed to
16 have this question arbitrated; that's why
17 we are here, and that's why we are not in
18 court.

19 And I think your question is the
20 right one, Mr. Chairman. We are adhering
21 to the contract. The contract said to
22 bring the dispute to this tribunal. We
23 have done that.

24 The contract says this tribunal can
25 rule on its own jurisdiction, including

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2 what the Uncitral rules say today.

3 CHAIRMAN FEINBERG: And if I
4 understand you correctly, Bob, you are
5 saying here that even if, and you dispute
6 it vigorously, even if the 2004
7 shareholder agreement is invalid, the
8 arbitration clause calling for arbitration
9 survives; is that your point?

10 MR. SILLS: That is exactly correct.

11 And that would be the case under
12 Prima Paint. That is the case under the
13 severability clause of the shareholders'
14 agreement.

15 It doesn't -- I mean, in the argument
16 before the break, we heard that the
17 severability clause somehow turned on the
18 materiality or importance of the clause.
19 It doesn't.

20 In fact, the severability clause
21 provides expressly that the invalidation
22 of the contract or any part of it in
23 another jurisdiction is without effect
24 here.

25 It, in effect, limits whatever effect

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2 the expertise of the existence of the
3 validity of the contract. We have done
4 that.

5 If we are wrong, we will resort to a
6 court here in New York, because that's the
7 deal the parties made.

8 CHAIRMAN FEINBERG: What do you mean
9 if we are wrong, we will resort to a
10 court? Are you saying -- what are you
11 saying? I would like to know what you
12 mean, if we are wrong.

13 MR. SILLS: I'm saying only, in
14 response to your question, and I think I
15 answered too broadly or I spoke too
16 broadly.

17 If we had to resort to a court,
18 although we don't believe we are required
19 to -- in fact, we believe we are required
20 to proceed before this tribunal as we are
21 doing -- we would follow what the contract
22 says and we would ask a New York court or
23 a federal court sitting in New York to
24 enforce this contract, which is subject to
25 New York law and provides for arbitration

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2 in New York.

3 CHAIRMAN FEINBERG: Well, I just --
4 again, it's on the record, and I maybe --
5 I want to make sure I understand what you
6 are saying.

7 Hypothetically, if this panel were to
8 rule that the issue of jurisdiction should
9 be resolved by the Ukrainian courts, are
10 you stating on the record that your next
11 course of action would not be to brief and
12 argue in the Ukrainian courts, but you
13 would go to the Southern District of New
14 York?

15 MR. SILLS: Well, it's a possibility
16 I don't want to contemplate, but --

17 CHAIRMAN FEINBERG: I thought that
18 was implicit in your statement.

19 MR. SILLS: -- but the answer is we
20 would regard that as an interim award,
21 subject to revision under the -- even the
22 very limited scope of review of an
23 arbitral award under the Arbitration Act
24 and we would seek review in the Southern
25 District.

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2 all that effort won't be futile because it
3 will be unenforceable, certainly
4 unenforceable in the Ukraine, if the
5 Ukrainian courts agree to accept it -- and
6 may well be unenforceable in American
7 courts because the Ukraine opinion may be
8 brought here as a defense to the
9 enforcement of the arbitration award.

10 MR. SILLS: Well, I think there are
11 two answers. We had extended discussion
12 before about this.

13 I don't have any reason to believe it
14 wouldn't be enforced in the Ukraine.

15 ARBITRATOR CRAIG: Isn't there legal
16 precedent to the contrary?

17 MR. SILLS: Well, I think there, as I
18 read that case, there was an actual -- as
19 I read that case, the party seeking
20 enforcement in Ukraine had participated.

21 It was -- it wasn't the highly
22 unusual facts we have here, where one of
23 the parties arranged to have itself sued
24 by it parent and then suddenly showed up
25 and said see, there is a decision of a

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2 CHAIRMAN FEINBERG: You would seek
3 review?

4 MR. SILLS: We would. And we would
5 seek to have it set aside, because it's
6 our position that the tribunal has
7 jurisdiction.

8 If the tribunal has no jurisdiction,
9 it seems to me it's to up to the parties
10 to select a court, because the panel can't
11 have jurisdiction to tell us where to go
12 under an agreement that the panel
13 concludes doesn't exist. So that any such
14 award I would think would be at war with
15 itself.

16 If you have jurisdiction to tell us
17 where to go, then you have jurisdiction to
18 decide whether or not the contract is
19 valid and enforceable, and there is no
20 need to tell us where to go.

21 ARBITRATOR CRAIG: In light of recent
22 precedents, what comfort can you give the
23 tribunal, if we go down the path which you
24 want us go, which is to find jurisdiction,
25 hear the merits, give you the award, that

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2 court of competent jurisdiction resolving
3 all these issues.

4 So, I think the case could be easily
5 distinguished.

6 Second, I don't know to what extent
7 that decision would be considered as
8 binding in other Ukrainian courts.

9 I know that Ukrainian law is
10 changing. But, for example, we sought
11 relief under the non-compete provisions of
12 the shareholders' agreement, which are
13 identical to the non-compete provisions of
14 the voting agreement.

15 If we secure relief there, it's going
16 to be either specific relief for
17 divestiture or monetary relief.

18 And it's going -- and will it run
19 against not only Storm, but its parents?
20 It's going to depend on the form of
21 relief. It's going to depend on --

22 ARBITRATOR CRAIG: You are in the
23 Ukraine courts making arguments on the
24 non-compete?

25 MR. SILLS: No, no. We are before

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2 you, Mr. Craig.

3 ARBITRATOR CRAIG: On the
4 non-compete?

5 MR. SILLS: They are competing. They
6 are operating at least one and we believe
7 two competing businesses in the Ukraine.

8 We can understand their enthusiasm
9 for raising a series of jurisdictional
10 arguments and not getting to the merits.
11 But could we enforce it in Ukraine? Could
12 we enforce elsewhere in Europe against
13 assets of the Alpha Group? Will Ukraine
14 courts simply thumb their noses at an
15 arbitral tribunal?

16 I can't answer those questions, but
17 it seems to me, it's beyond not graceful,
18 it's inappropriate for a party that agreed
19 to arbitration to turn around and say,
20 well, we can't arbitrate because we intend
21 to do everything we can to frustrate this
22 in our national courts.

23 We can enforce that decision here,
24 for example. We could homologate the
25 award and reduce it to an American

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2 judgment.

3 Will the Ukraine court ignore an
4 American judgment? I don't know the
5 answer to that. I suspect no one around
6 this table does.

7 And then if the question is whether
8 the Ukraine court will refuse to enforce
9 an American judgment two or three or four
10 years from now? I don't know the answer
11 to that either.

12 Alpha seemed prepared to take
13 reputational risks in signing agreements
14 and then turning its back on them. Are
15 they prepared to take the reputational
16 risks of losing an arbitration and then
17 walking away from it? Because at some
18 point they are going to run out of people
19 who will do business with them, who will
20 sign agreements that they won't honor, who
21 will arbitrate with them and then have
22 them hide behind national courts if they
23 think they can.

24 I don't know the answer to any of
25 those questions, but I know that the

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2 parties agreed to arbitrate all issues
3 here. I know that they agreed on an
4 especially broad arbitration clause and I
5 think they should be held to their
6 bargain. If we have problems enforcing an
7 award down the road, that is a problem we
8 are prepared to live with.

9 And it seems to me that's our
10 problem, but it's not a defense to going
11 forward.

12 CHAIRMAN FEINBERG: What about the
13 quite separate issue posed by Storm that
14 you guys certainly should have known that
15 without ratification, the 2004 agreement
16 was null and void and that, you know, you
17 only have yourself to blame?

18 MR. SILLS: I have a lot of trouble
19 getting my arms around that argument.

20 We, as part of the closing of the
21 signing of the 2004 contract, we were
22 given two certificates; one signed by the
23 chairman of Storm attesting to the fact
24 that Mr. Nilov had authority to sign that
25 agreement. That is the sort of estoppel

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2 document that is given every day in a
3 corporate transaction.

4 It seems to me that for Storm to say,
5 well, now, we are told in the letter
6 forecasting what Mr. Nilov might say,
7 after six months presumably, is that he
8 thought he had authority.

9 We were told he had authority. We
10 were told in the most formal possible
11 sense he had authority, and I don't want
12 to rehearse everything that is in our
13 brief, but there is a series of e-mails
14 talking about how Mr. Nilov has authority
15 including, for example, Mr. Wack's
16 statement in the papers, in the e-mails
17 that are attached to Mr. Lykke's
18 affidavit, he specifically says that
19 Mr. Nilov can sign documents without a
20 power of attorney. That appears in --
21 it's Exhibit K to Mr. Lykke's affidavit.

22 And there is a series of e-mail
23 exchanges involving Mr. Wack. And I can
24 understand why he doesn't want to come
25 here and testify there was a problem,

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2 because there wasn't a problem, and these
3 e-mails make it very clear.

4 ARBITRATOR CRAIG: Exhibit what?

5 MR. SILLS: K, on the second page of
6 that exhibit, the second e-mail from
7 Mr. Wack to a -- to Mr. O'Driscoll and a
8 number of others at Telenor.

9 Mr. Wack, the company's long-time
10 lawyer said this: Storm only has one
11 officer, the general director, who is
12 authorized to sign documents on behalf of
13 Storm without a power of attorney.

14 We have Mr. Rabij's affidavit, which
15 is the only evidence on the question of
16 Ukrainian law that Mr. Van Tol addressed
17 or attempted to address, as to whether or
18 not the 2002 authorizations were good
19 enough for 2004 on the question of actual
20 authority, and he concludes that they are.

21 I don't see how someone, who is not a
22 Ukrainian lawyer, is in a position to
23 express an opinion on that, and the
24 Ukrainian lawyers' affidavit that we have
25 seen don't address that issue.

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2 in the case he was supposedly defending.

3 And then the estoppel certificates
4 are delivered, two certificates expressly
5 attesting to Mr. Nilov's authority and
6 annexing to those certificates minutes
7 number 30, annexing the minutes of the
8 2002 meeting -- I'm sorry, of the 2002
9 unanimous written consent, the written
10 polling, which is at least an implicit
11 recognition on their part that they
12 thought it was authorized.

13 Then what happens? After the deal is
14 signed and closed, the parties go ahead
15 and implement it. The parties go ahead
16 and amend the charter, as required by the
17 agreement, shares are exchanged and they
18 go to meetings.

19 And it's -- I think one of your
20 questions before the luncheon recess,
21 asked, you know, why did they do this?

22 The answer is because they saw a
23 chance to get something for nothing. They
24 own less than 50 percent of this company.
25 By waging this relentless legal attack, by

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2 In fact, Mr. Rabij concludes that
3 under Ukrainian charter and under
4 Ukrainian law there was actual authority,
5 even without a meeting. And the scope of
6 the powers of a general director of a
7 Ukrainian limited liability company or
8 corporation, as I understand it, are
9 extraordinarily broad, broader than the
10 powers of the president of a New York or
11 Delaware corporation.

12 But even if there were some problem
13 with the actual authority, it brings us to
14 the question of apparent authority that
15 you had raised. And there we have a
16 negotiated and executed document. We have
17 repeated assurances that Mr. Nilov has
18 authority.

19 We are even told that because Nilov
20 is the right guy, can he sign by fax and
21 then resign, and he does. He then comes
22 and signs the document in Ukrainian, which
23 he does. A fact, by the way, that
24 Mr. Klymenko didn't see fit to bring to
25 the attention of the case -- of the court

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2 inventing these claims of lack of
3 authority, they think they can get more of
4 an extremely valuable company. This is
5 the largest mobile phone company in
6 Ukraine. It has tremendous and growing
7 value.

8 I don't want to go into Alpha's
9 history of corporate raiding, but it's
10 fairly extensive.

11 ARBITRATOR JENTES: I don't want to
12 break your thoughts, but I want to come
13 back.

14 I have now read the case that you
15 have handed out, the Shaw Group case and,
16 at least as I read that case, it's a
17 different kind of case from where we are
18 here and I am interested in your comment.

19 That's a case where there is no
20 challenge that there was no agreement.
21 The claim is that the agreement didn't
22 cover arbitration of the particular issue
23 that was thought to be involved in the
24 dispute, so that the issue was, as it was
25 in First Options, you know, who is going

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2 to decide the arbitrability issue.

3 And the Court, the Second Circuit
4 said, well, First Options tells us that
5 you can have an agreement that that's
6 going to be decided by the panel. But I
7 don't read that as covering our case or
8 the kind of Sphere Drake kind of situation
9 where the challenge is the agreement was
10 void.

11 So, it's a fine point.

12 Unfortunately, it seems to me it is
13 the absolute crucial point here. So I am
14 interested in that point.

15 And let me ask, I only want to put
16 out on the table the other problem, and
17 that is: What are we to do with the
18 decision, both at the first instance trial
19 and on appeal by the Ukrainian courts,
20 that the agreement is null and void,
21 including the arbitration agreement?

22 Putting it bluntly, are we just to
23 thumb our nose at that and proceed? How
24 do we deal with that?

25 MR. SILLS: I wouldn't have put it

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2 notice to you.

3 MR. SILLS: And with no notice to us,
4 not only of the commencement of the case,
5 of the supposed first judgment and of this
6 appeal. We weren't parties. We are not
7 bound, we, Telenor, are not bound by its
8 common currency. We are not, cannot be
9 bound by a decision where we weren't
10 parties.

11 The notion that we should in effect
12 honor the violation of the agreement by
13 intervening at the second appellate stage
14 in Ukraine, and be stuck with the record
15 the that Mr. Kirilenko was kind enough to
16 make on our behalf strikes me as absurd.

17 So, I wouldn't say to thumb our
18 noses, because I don't think Ukrainian or
19 any other court deserves that, but I would
20 ignore it.

21 I think it's a fact of no juridical
22 jurisdiction or significance. It's sort
23 of interesting, I think it teaches us
24 something about the course of Ukrainian
25 justice, but I don't think it stands for

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2 quite that bluntly but the answer is, yes,
3 I would ignore it.

4 It is a collusive, meaningless
5 decision. That is the argument we made
6 last time. Having now seen the record in
7 this case, which we saw for the first time
8 on Wednesday, despite -- which we saw for
9 the first time on Wednesday.

10 ARBITRATOR JENTES: So we should find
11 that it was a collusive decision, and what
12 is the evidence that we have that it is a
13 collusive decision?

14 MR. SILLS: Well, I think the best
15 evidence is that this was a case brought
16 by Storm -- I'm sorry, against Storm by
17 its own corporate parent; that Storm put
18 up no defense, other than to send a layman
19 who said there is an arbitration
20 proceeding of some kind, and that to this
21 day no one seems to be able tell us what,
22 if any, evidence was presented, nor for
23 that matter can anyone tell us what
24 actually happened.

25 CHAIRMAN FEINBERG: And with no

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2 anything.

3 At a minimum, it hardly forecloses
4 us. It's not res judicata. We are not
5 collaterally estopped. We weren't
6 parties. We weren't made parties. There
7 was clearly an intentional decision not to
8 make us parties, although we are the only
9 real party in interest.

10 It's between a corporate parent and
11 its direct subsidiary. It wasn't
12 defended. It was prosecuted by a regular
13 attorney for Storm, Mr. Marchenko. His
14 biography and his law firm's Web site are
15 available online. He is a lawyer.

16 Although Storm seems perfectly
17 capable of hiring lawyers, they chose to
18 send a layman. I think it's safe to say
19 he didn't do a very good job. It sort of
20 illustrates how right Justice Black was
21 about needing the guiding hand of counsel.
22 I don't know what more I can say about it.
23 It strikes us, it strikes me as almost
24 absurd.

25 And the notion that that case,

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<p>1 Proceedings</p> <p>2 brought by Storm against itself, should</p> <p>3 somehow determine the course of these</p> <p>4 proceedings, when the parties agreed that</p> <p>5 this is where they would be conducted,</p> <p>6 strikes me as running in reverse in</p> <p>7 effect.</p> <p>8 I mean, I -- as to your other</p> <p>9 question, I think -- I don't mean to say</p> <p>10 this case is the be all and end all. And</p> <p>11 we would be prepared to brief this. It</p> <p>12 seems to me it is a pure question of law.</p> <p>13 It turns on the meaning of arbitrability.</p> <p>14 And I think the way in which First Options</p> <p>15 has been understood in the legal community</p> <p>16 is that the parties can agree to confer on</p> <p>17 the arbitrable tribunal as much or as</p> <p>18 little jurisdiction as they can because</p> <p>19 it's a matter of contract.</p> <p>20 ARBITRATOR JENTES: But it's only if</p> <p>21 there is a contract; that is the problem</p> <p>22 that I have.</p> <p>23 MR. SILLS: I don't think that's</p> <p>24 exactly right, Mr. Jentes, with all</p> <p>25 respect. Because by creating a strict</p>	<p>1 Proceedings</p> <p>2 condition of severability under the</p> <p>3 Uncitral rules, by saying, in effect, the</p> <p>4 parties with one signature signed two</p> <p>5 separate agreements -- and that's what I</p> <p>6 think Article 21.2 says -- you would have</p> <p>7 to show that the arbitration agreement,</p> <p>8 that second, separate and separable</p> <p>9 agreement is, itself, invalid. They can't</p> <p>10 show that.</p> <p>11 No one has claimed that Mr. Nilov's</p> <p>12 signature isn't Mr. Nilov's signature, and</p> <p>13 as the general director of that company,</p> <p>14 he could sign a separate agreement to</p> <p>15 arbitrate. So, I guess imagine</p> <p>16 hypothetically that, simply as a drafting</p> <p>17 matter, we have signed the shareholders'</p> <p>18 agreement, and at the same time there had</p> <p>19 been a two-page agreement called</p> <p>20 arbitration agreement, and Mr. Nilov put</p> <p>21 his signature and the company stamp on</p> <p>22 that, and it provided exactly what is</p> <p>23 provided in Article 12 of the</p> <p>24 shareholders' agreement, and they came in</p> <p>25 and said the shareholders' agreement, all</p>
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<p>1 Proceedings</p> <p>2 these provisions about corporate</p> <p>3 governance and changing the chart and the</p> <p>4 IPO and everything else, it's all invalid.</p> <p>5 Nilov didn't have permission and we told</p> <p>6 you he didn't have permission. It's a</p> <p>7 nullable.</p> <p>8 We would then invoke that second</p> <p>9 agreement and say you have to come</p> <p>10 arbitrate in New York before three</p> <p>11 arbitrators as we agreed in a separate</p> <p>12 arbitration agreement.</p> <p>13 I don't think anyone would contend</p> <p>14 that the fact that they were challenging</p> <p>15 the substantive provisions of that first</p> <p>16 agreement would some invalidate the second</p> <p>17 agreement. That is the exact effect of</p> <p>18 incorporating the Uncitral rules into the</p> <p>19 contract.</p> <p>20 And what that case stands for, and</p> <p>21 the reason I distributed it, is that when</p> <p>22 you incorporate arbitration rules into a</p> <p>23 contract, it is as if you had set them out</p> <p>24 verbatim, as if there had been a separate,</p> <p>25 initialed section there, and the</p>	<p>1 Proceedings</p> <p>2 arbitration clause survives under the</p> <p>3 express terms that the parties agreed.</p> <p>4 Would it be common under, say, a</p> <p>5 standard AAA clause? No. But this is not</p> <p>6 that.</p> <p>7 And parties went to great length here</p> <p>8 to take this case away from the courts, to</p> <p>9 take the case, any possible dispute into</p> <p>10 New York, and that's what they did.</p> <p>11 And I think the fact that they did it</p> <p>12 in a shorthand way, by incorporating the</p> <p>13 Uncitral rules instead of having a second</p> <p>14 agreement executed is legally meaningless.</p> <p>15 It's Article 21.2 of the Uncitral</p> <p>16 rules that govern here, and they are as</p> <p>17 clear as could be, that this tribunal has</p> <p>18 the power to rule on whether or not the</p> <p>19 contract under which its jurisdiction is</p> <p>20 invoked exists or is valid or is duly</p> <p>21 authorized.</p> <p>22 You know, I put to one side the fact</p> <p>23 that after -- this case was brought in</p> <p>24 February, and we have still haven't seen a</p> <p>25 shred of evidence, other than the Alperin</p>

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2 case, that suggests there is anything
3 wrong with this contract.

4 But I put that to one side, because
5 under Sphere Drake you have got to make a
6 preliminary showing that would be enough
7 to defeat a motion for summary judgment to
8 get a trial.

9 Well, this is that trial, we have had
10 it and I think the evidence is absolutely
11 clear that this contract was negotiated
12 between serious commercial parties, it was
13 agreed in 2002 that there would be a
14 three-day trigger, that as soon as Alpha
15 succeeded in buying the Omega shares,
16 leaving the only two shareholders, the
17 parties had the whole thing all arranged.

18 It was ready for a closing and it
19 wasn't some agreement to agree. It said
20 three days after you buy the Omega shares,
21 we will cancel the 1998 agreement and we
22 will sign the new shareholders' agreement.

23 Then they came to us and asked for an
24 extension. We gave it to them.

25 They came to us and suggested adding

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2 Storm and Alpha could not have bought up
3 to 40 percent of the company. And as a
4 matter of Ukrainian law, once you cross
5 that 40 percent threshold, you have the
6 power to prevent a quorum from occurring,
7 you have the power to block corporate
8 action.

9 Below that, you are a locked in
10 minority investor.

11 We agreed, Telenor agreed to let them
12 invest up to the 43.5 percent that they
13 currently hold, in reliance on their
14 promise to enter into the shareholders'
15 agreement. And because they couldn't
16 enter into the shareholders' agreement,
17 because they were having trouble buying
18 out Omega, we entered into a voting
19 agreement.

20 The substantive terms of that
21 agreement are the same as the substantive
22 terms of the shareholders' agreement,
23 except for the clause that they asked for.

24 And that voting agreement, which was
25 purportedly invalidated by the Ukrainian

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2 these termination provisions, and I
3 suppose in yet another good example of the
4 truism that no good deed goes unpunished,
5 we agreed, we negotiated.

6 The contract was changed, to the
7 extent it was changed, at their instance.
8 And it seems to me now that for Storm to
9 come before this tribunal and say that
10 Telenor, having acceded to their request,
11 their importuning really because it was
12 over Telenor's objection, that we add one
13 term to the contract which our witness
14 said he didn't view as a matter of
15 business significance, that they should
16 now say ah-ha, you see, we needed a second
17 authorization.

18 We didn't get it, although we told
19 you it was authorized, and then we lived
20 under the contract for a year, and we
21 didn't provide any kind of notice, it is
22 absurd.

23 And if you go way back to the
24 beginning, to 2002, and to Mr. Hansen's
25 affidavit, without Telenor's consent,

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2 court, there can't be any question about.
3 They had a unanimous written consent and
4 then they had a meeting, and then they
5 executed it, and put their stamp and seal
6 on it.

7 But, nonetheless, we hear that
8 Mr. Nilov wasn't authorized to execute
9 that either, which I think tells you
10 something about the quality of the defense
11 that was put on in that Ukrainian case.

12 It seems to me, this is a case that's
13 been going on far too long on very
14 preliminary questions. The parties agreed
15 to have this dispute here. They are in
16 grotesque violation of the substantive
17 provisions of this agreement. They don't
18 come to shareholder meetings. They don't
19 come to board of directors meetings.

20 It is a having a serious deleterious
21 effect on the company, because corporate
22 governance requires that shareholder and
23 directors meetings be held. They are
24 competing with the company and at the same
25 time they are waging war on their own

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<p>1 Proceedings</p> <p>2 agreement in the Ukrainian courts. And it</p> <p>3 seems to me it is time.</p> <p>4 This is at least their second effort</p> <p>5 and their third theory in an effort to get</p> <p>6 out from under the agreement they signed</p> <p>7 and it's time to move on to the substance</p> <p>8 of the this dispute.</p> <p>9 CHAIRMAN FEINBERG: Thank you.</p> <p>10 ARBITRATOR JENTES: Let me ask this.</p> <p>11 How long did it take you to get the</p> <p>12 reversal of the December order? How fast</p> <p>13 did you move there?</p> <p>14 MR. SILLS: It was reversed in June,</p> <p>15 at the end of June, June 27th. I believe</p> <p>16 it was a matter of a month or two from the</p> <p>17 time the application was made.</p> <p>18 ARBITRATOR JENTES: And did you move</p> <p>19 immediately after the December order?</p> <p>20 MR. SILLS: If you will bear with me</p> <p>21 one second.</p> <p>22 ARBITRATOR JENTES: Sure. Just</p> <p>23 generally, how long did that take?</p> <p>24 MR. SILLS: It was filed, I think, in</p> <p>25 the beginning of June based on another</p>	<p>1 Proceedings</p> <p>2 appellate decision that cast doubt on</p> <p>3 the -- it was, that was the new fact.</p> <p>4 So, it wasn't an immediate motion for</p> <p>5 rehearing as you might see in a federal</p> <p>6 court of appeals?</p> <p>7 ARBITRATOR CRAIG: It was five months</p> <p>8 after.</p> <p>9 ARBITRATOR JENTES: You got, I take</p> <p>10 it, before the Cascais court within a</p> <p>11 couple of weeks then?</p> <p>12 MR. SILLS: I believe that's right.</p> <p>13 ARBITRATOR JENTES: Sorry.</p> <p>14 You moved to set aside the December</p> <p>15 order five months after the December order</p> <p>16 had been entered?</p> <p>17 MR. SILLS: I believe that's right.</p> <p>18 And then Alpha immediately sought an</p> <p>19 appeal. They had gotten their appeal</p> <p>20 accepted by the supreme court and some got</p> <p>21 an order suspending the June 27th order.</p> <p>22 ARBITRATOR JENTES: I have another</p> <p>23 question. I hope I don't get too far</p> <p>24 afield.</p> <p>25 Are you up on the other Sphere Drake</p>
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<p>1 Proceedings</p> <p>2 case in the Seventh Circuit?</p> <p>3 MR. SILLS: I know the case. I'm not</p> <p>4 sure -- I know the case.</p> <p>5 ARBITRATOR JENTES: Well, the only</p> <p>6 reason --</p> <p>7 MR. SILLS: Judge Easterbrook's case.</p> <p>8 ARBITRATOR JENTES: I suspect that we</p> <p>9 are going to hear about it, because it's</p> <p>10 fairly explicit on who has the authority</p> <p>11 and Judge Easterbrook says as follows. I</p> <p>12 am at page four of the reprint, if you</p> <p>13 have got it.</p> <p>14 I will read you the language and then</p> <p>15 I will give you it.</p> <p>16 It says, "Many appellate courts have</p> <p>17 held that the judiciary, rather than an</p> <p>18 arbitrator, decide whether a contract came</p> <p>19 into being, and then Judge Easterbrook</p> <p>20 cites three different cases from the</p> <p>21 Courts of the Third, the Eighth and the</p> <p>22 Ninth Circuit."</p> <p>23 And he says, most of these decisions</p> <p>24 involve the same question as our case,</p> <p>25 whether a dispute about an agent's</p>	<p>1 Proceedings</p> <p>2 authority to bind the principle to the</p> <p>3 contract is arbitrable. Every appellate</p> <p>4 court that has addressed this question has</p> <p>5 answered, "No, unless...".</p> <p>6 The quote, unless, end of quote,</p> <p>7 clause reflects the fact that parties may</p> <p>8 agree separately to arbitrate disputes</p> <p>9 about whether they have agreed to the</p> <p>10 contract's substantive promises, and then</p> <p>11 he cites to First Option.</p> <p>12 Then he goes on: The approach of</p> <p>13 Sandvik, that is the case from the Third</p> <p>14 Circuit, and its predecessors is sound for</p> <p>15 a person who has not consented or</p> <p>16 authorized an agent to do so on his behalf</p> <p>17 can't be packed off to a private forum.</p> <p>18 Courts have jurisdiction to determine</p> <p>19 their own jurisdiction, not only out of</p> <p>20 necessity, (how else would jurisdictional</p> <p>21 disputes be resolved?), but also because</p> <p>22 their authority depends on statutes rather</p> <p>23 than the parties' permission.</p> <p>24 Arbitrators lack a comparable</p> <p>25 authority to determine their own authority</p>

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<p>1 Proceedings</p> <p>2 because there is a non-circular</p> <p>3 alternative, (the judiciary), and because</p> <p>4 the parties do control the existence and</p> <p>5 limitations of an arbitrator's power. No</p> <p>6 contract, no power.</p> <p>7 MR. SILLS: I couldn't -- not that</p> <p>8 any intelligent lawyer would disagree with</p> <p>9 Judge Easterbrook, but --</p> <p>10 CHAIRMAN FEINBERG: You would be</p> <p>11 surprised.</p> <p>12 MR. SILLS: I tried, and it's a</p> <p>13 losing fight.</p> <p>14 I think that's a perfectly accurate</p> <p>15 statement of the law, and I think the</p> <p>16 language that's directly relevant here is</p> <p>17 the unless that you read.</p> <p>18 ARBITRATOR JENTES: So we are back to</p> <p>19 severability.</p> <p>20 MR. SILLS: "Unless" reflects that</p> <p>21 fact that parties may agree separately to</p> <p>22 arbitrate disputes about whether they have</p> <p>23 agreed to the contract's substantive</p> <p>24 promises, citing First Options.</p> <p>25 And I think that is the way in which</p>	<p>1 Proceedings</p> <p>2 First Options is read in every court of</p> <p>3 appeals and so far as I know in every</p> <p>4 state court, because they are, after all,</p> <p>5 bound to the FAA as well.</p> <p>6 That's what the parties did here.</p> <p>7 That's the express and exact language of</p> <p>8 Article 21 of the Uncitral rules. And the</p> <p>9 Second Circuit case, Judge Raggi's case,</p> <p>10 makes it absolutely clear that by</p> <p>11 referring to the rules, they are set out</p> <p>12 verbatim in the contract, so that if this</p> <p>13 language from Article 21.2 were set out</p> <p>14 word for word as part of Article 28 -- I'm</p> <p>15 sorry, part of Article 12 in the</p> <p>16 shareholders' agreement, there wouldn't be</p> <p>17 much of a discussion because could the</p> <p>18 parties separately agree to arbitrate?</p> <p>19 Yes. And Judge Easterbrook says they</p> <p>20 could.</p> <p>21 Did they? Yes, they did.</p> <p>22 How did they do it? They did it by</p> <p>23 incorporating these rules by reference.</p> <p>24 That's what these rules say, and they</p> <p>25 expressly say this tribunal shall have the</p>
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<p>1 Proceedings</p> <p>2 power to determine the existence or the</p> <p>3 validity of the contract of which an</p> <p>4 arbitration clause forms a part for the</p> <p>5 purposes of Article 21 of the Uncitral</p> <p>6 Rules, of course. An arbitration clause</p> <p>7 which forms part of a contract and which</p> <p>8 provides for arbitration under these</p> <p>9 rules, which this one does, shall be</p> <p>10 treated as an agreement independent of the</p> <p>11 other terms of the contract.</p> <p>12 That meets the conditions set by</p> <p>13 Judge Easterbrook in that case. I think</p> <p>14 his summary of the law is, not</p> <p>15 surprisingly, perfectly accurate, and we</p> <p>16 come squarely within its terms.</p> <p>17 ARBITRATOR JENTES: Okay.</p> <p>18 CHAIRMAN FEINBERG: Panelists, any</p> <p>19 other questions?</p> <p>20 Pieter, do you have any rebuttal?</p> <p>21 MR. VAN TOL: I do. But may I take a</p> <p>22 quick five-minute break?</p> <p>23 CHAIRMAN FEINBERG: Let's take a</p> <p>24 10-minute break. Then we will hear</p> <p>25 rebuttal.</p>	<p>1 Proceedings</p> <p>2 MR. VAN TOL: Yes, brief.</p> <p>3 (Recess taken.)</p> <p>4 CHAIRMAN FEINBERG: Let's ask,</p> <p>5 Pieter, if he had any rebuttal, I will</p> <p>6 exercise the prerogative of the Chair now</p> <p>7 and keep any rebuttal or cross rebuttal or</p> <p>8 re-rebuttal to a minimum. So, go ahead,</p> <p>9 Pieter.</p> <p>10 MR. VAN TOL: Just returning to the</p> <p>11 jurisdictional point quickly, these are</p> <p>12 great issues to kick around, but I think</p> <p>13 one way to harmonize the cases is to</p> <p>14 recognize that we have never challenged</p> <p>15 the tribunal's jurisdiction to determine</p> <p>16 its jurisdiction.</p> <p>17 That's what's going on in these</p> <p>18 clauses. You shall have the power to</p> <p>19 determine jurisdiction, but then what</p> <p>20 happens is Sphere Drake kicks in.</p> <p>21 Says where, in a case where you are</p> <p>22 determining your jurisdiction, there is an</p> <p>23 issue of contract formation, the person</p> <p>24 opposing arbitration has to come up with</p> <p>25 some evidence and, assuming they do, they</p>

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2 get their trial, their day in court.

3 They're easily harmonized provisions.

4 And to that extent, that's why we are
5 here and that's why we are not in a court
6 right now.

7 CHAIRMAN FEINBERG: Let me ask a very
8 important question then for me.

9 You have just said on the record that
10 you are not here challenging this
11 tribunal's ability to determine
12 jurisdiction.

13 MR. VAN TOL: Correct.

14 CHAIRMAN FEINBERG: But under the
15 case law, your position is the
16 arbitration -- the arbitrators have no
17 jurisdiction.

18 MR. VAN TOL: Correct. And it's
19 actually -- I'm sorry. Go ahead.

20 CHAIRMAN FEINBERG: We have heard
21 from Bob that if we were to rule that we
22 have no jurisdiction, I think Bob says
23 Telenor will run into the U.S. District
24 Court.

25 I take it from what you have just

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2 said, that if we were to rule that we do
3 have jurisdiction, since you are not
4 challenging our ability to rule in that
5 regard, are you prepared to live with our
6 decision?

7 MR. VAN TOL: No, for this reason.

8 I am saying you have the power to
9 determine your jurisdiction. In making
10 that determination, you are bound by what
11 happened in the Ukraine. That's the
12 distinction with the cases that Mr. Sills
13 has been talking about.

14 He hasn't shown you a case where
15 there was a determination by a court that
16 there was no contract and where the
17 severability idea was tossed out the
18 window.

19 CHAIRMAN FEINBERG: I just want to
20 make sure I understand what you are
21 saying.

22 Now, you are saying on the record
23 that we are bound by the Ukraine, so
24 forget the law in the Second Circuit. I
25 take it if we were to find that you have

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2 not carried your burden under case law,
3 and we will exercise jurisdiction by
4 meeting case law requirements, are you
5 then saying since there are Ukraine
6 decisions, it doesn't matter how you rule
7 as a tribunal.

8 We rely on those Ukrainian
9 discussions and, therefore, you cannot
10 exercise a decision on the jurisdiction
11 other than consistent with Ukrainian case
12 law.

13 MR. VAN TOL: That's half of it.

14 The other half is we start at Sphere
15 Drake. We say you have the power to
16 determine your jurisdiction, whether you
17 have jurisdiction; that's informed by
18 Sphere Drake.

19 We pass the sum evidence test and it
20 has to be decided by a court because of
21 the Ukraine, that's one.

22 Assuming, we get beyond that and you
23 say no, no, we want to decide whether or
24 not there is jurisdiction. It's our
25 position that your hands are tied because

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2 you have determined that New York law
3 applies to these procedural matters.

4 A New York court sitting as you do
5 would say I have got a Ukrainian judgment.
6 I'm allowed to ignore that judgment under
7 three sets of circumstances: Procedural
8 irregularly, due process problems, that's
9 one; second, one of the parties in that
10 action, there is no personal jurisdiction
11 or there is no subject matter
12 jurisdiction; or, three, there is a public
13 policy reason for us to ignore it.

14 None of that is here. So, you run
15 the risk of a manifest disregard of the
16 law if you don't follow it.

17 CHAIRMAN FEINBERG: If we do that
18 what is Storm's next step?

19 MR. SILLS: If you do not follow the
20 Ukrainian court, then we would have to go
21 to a U.S. court, whatever one has
22 competent jurisdiction, and say you have
23 manifestly disregarded the law.

24 CHAIRMAN FEINBERG: So if I
25 understand you correctly, if we rule for

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2 Telenor and find jurisdiction to
3 arbitrate, you are going to the U.S.
4 District Court or you are going to a
5 federal court?

6 MR. VAN TOL: It depends on what you
7 rule. If you rule simply that you have
8 jurisdiction to determine the issue of
9 contract formation and for some reason you
10 want to hear more about what happened in
11 the Ukraine to satisfy yourself that those
12 three things I have identified aren't in
13 play, then no, we will await your
14 decision.

15 We said earlier, when we say you are
16 allowed to apply Ukraine law, we mean it
17 literally. We want you to take the law
18 that has been determined by the Ukraine
19 and apply it here and say sorry, no
20 contract.

21 CHAIRMAN FEINBERG: If we instead
22 rule that, on this record, we rule in
23 favor of exercising jurisdiction,
24 notwithstanding your argument about
25 Ukrainian courts, then you plan to go into

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2 federal court?

3 MR. VAN TOL: That's correct.

4 ARBITRATOR JENTES: What, exactly, do
5 you mean, we have jurisdiction?

6 MR. VAN TOL: It's within your power
7 under the Uncitral rules. You do have the
8 power to determine whether or not this
9 case should go forward.

10 In other words, you have the power to
11 determine whether or not there was a
12 contract. But that's informed by the
13 Sphere Drake standard which says, ah, but
14 if the person in my shoes opposing that
15 says I have got evidence that no contract
16 exists and it passes the sum evidence
17 test, then you have got to go to court.

18 That's the only way to, that's the
19 only way to reconcile these cases,
20 otherwise they are completely
21 irreconcilable.

22 As I said earlier, we haven't seen a
23 case from Mr. Sills where there is an
24 earlier judicial determination that there
25 is no contract and a U.S. court said the

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2 panel was completely right in going
3 forward.

4 Especially here where the Ukraine
5 court went to the length to not only void
6 the contract but to void the arbitration
7 clause, effectively saying Nilov didn't
8 have the authority to enter into the
9 arbitration clause.

10 So, it's not like Mr. Sills' example
11 where we had here is your contract. Here
12 is the separate agreement. You don't have
13 authority for one, you have authority for
14 the other. He had authority for neither.

15 ARBITRATOR JENTES: If we have
16 jurisdiction to decide that we should go
17 forward, I think that's what you said, can
18 we decide that the Ukrainian courts did
19 not have a fully developed record and,
20 therefore, we are not going to follow that
21 decision?

22 MR. VAN TOL: I have never seen a
23 case allowing for non-recognition of a
24 judgment on those grounds. I have seen
25 cases, and we submit in our brief, I have

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2 seen cases lamenting for the judicial
3 system is in another country saying it
4 didn't look like it was a great trial, but
5 then they say our hands are tied. You
6 have to follow what happened in the
7 Ukraine.

8 And I was struck by Mr. Sills about
9 how poor the defense was for Mr. Klymenko
10 because one of the defenses he raised is
11 the one that Mr. Sills is raising, that it
12 should be determined by an arbitration
13 panel. That is highly ironic.

14 And he is misrepresenting the record
15 when he continually says that the fact
16 that there was a contract in Ukrainian was
17 enough.

18 That is not enough. The Ukraine
19 court said you need a contract in Ukraine
20 filed with the Ukrainian authorities so
21 that someone can see that there is a
22 limitation on the charter.

23 So, it's not true and there is no
24 evidence whatsoever for Mr. Sills that
25 this was at all collusive. As I said at

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2 the first hearing, I have never heard of
3 collusion involving an appeal. Documents
4 were put before the Ukrainian court.
5 Absent some aberration in the procedure or
6 something else, you have to follow it.

7 And the last point I would like to
8 make, because I am cognizant of the late
9 hour --

10 ARBITRATOR CRAIG: What documents
11 were presented to the Ukrainian court?

12 MR. VAN TOL: The voting agreement
13 and the shareholders' agreement at a
14 minimum.

15 ARBITRATOR CRAIG: Anything else?

16 MR. VAN TOL: Not that I'm aware of
17 in terms of the documents. Again, I don't
18 know what was said by the parties or
19 handed up to the court, only what is in
20 the Court file.

21 Mr. Sills still hasn't given you an
22 answer to your question, which was why
23 don't you go to the Ukraine?

24 This clause, the Uncitral clause,
25 does not prohibit Telenor Mobile from

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2 going to the Ukrainian court. It says you
3 may determine your jurisdiction. It does
4 not stop him from trying to go to the
5 Ukrainian court and getting a resolution
6 of this matter.

7 CHAIRMAN FEINBERG: You may be right.
8 He's given us an answer. I'm not sure you
9 like it, but there is an answer on the
10 record.

11 MR. VAN TOL: If the answer is I'm
12 nervous about the Ukrainian court system,
13 that doesn't cut it. I mean, it's got to
14 protect his rights by going and making
15 sure that there is an adequate record in
16 the Ukraine.

17 And as I said in the main part of my
18 remarks, if a client came to me, I would
19 hope anyone would advise any client of
20 this. One, I have got a judgment against
21 me. The last thing I would tell them is
22 ignore it.

23 CHAIRMAN FEINBERG: Thank you.

24 Mr. Sills, do you have one or two
25 rebuttal points?

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2 MR. SILLS: Yes, I do.
3 Let me pick up on that very last
4 comment. There is no judgment against
5 Telenor. Telenor wasn't a party. The
6 case was concealed from Telenor. I don't
7 want to beat the horse any more about the
8 quality of Ukrainian justice or the
9 quality of this case or the apparent
10 inability of Storm to describe its own
11 Ukrainian litigation. I think the record
12 is fully developed on that.

13 As far as the interpretation of
14 Sphere Drake, Sphere Drake sets out a
15 party opposing arbitration had to make
16 some sort of evidentiary showing that
17 there is a problem with the arbitration
18 agreement and, if so, it's entitled to
19 trial.

20 If there is jurisdiction to hear
21 question one, then there is jurisdiction
22 to hear question two and we have heard it.

23 Finally, on this question of
24 registration in Ukraine, I think there the
25 dispositive -- this case is being heard by

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2 agreement of parties under New York law
3 without reference to any choice of law
4 doctrines.

5 And here the case that is precisely
6 on point is the decision of the New York
7 Court of Appeals in the Indosuez case,
8 which was annexed to our previous papers.
9 In Indosuez, the fact, the claim was
10 raised by a Russian party to a contract
11 that because, as allegedly required by
12 Russian law at that time, the accountant
13 general of the company had to sign, and no
14 one else could sign, that the contract was
15 invalid, a lack of authorization argument
16 with that.

17 And what the New York Court of
18 Appeals held was that, as a matter of New
19 York law, he had apparent authority, and
20 whether or not he had actual authority
21 under this supposed Russian legal
22 principle was irrelevant. And the same is
23 true here.

24 We don't require that contracts be
25 filed in Ukraine or elsewhere in New York.

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2 This is a perfectly valid, negotiated,
3 executed contract with all the usual
4 indicia of authority and authenticity.
5 And the fact -- and I don't know that, in
6 fact, it had to be filed in Ukraine.
7 And the only evidence of that is this
8 self, you know, this self-generated case
9 that we have heard so much about. But
10 even if that were true, it would be
11 irrelevant here because Indosuez is
12 dispositive on that point. It's directly
13 on point, except that there the claim was
14 that the accountant general had to sign,
15 here the claim is it had to be filed with
16 some official in Kiev. I think it's time
17 to get on to the merits.
18 CHAIRMAN FEINBERG: Thank you all
19 very, very much.
20 The panel -- stick around. The panel
21 will, I think, get together next door, and
22 decide how we are going to go forward,
23 what we are going to say. Just stand by.
24 Very well done.
25 (Recess.)

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2 whatever.
3 MR. SILLS: Mr. Feinberg, I don't
4 mean to interrupt, but I have an
5 unbreakable --
6 CHAIRMAN FEINBERG: Whenever you say
7 you don't mean to interrupt, you go right
8 ahead --
9 MR. SILLS: You figured me out.
10 Mr. Feinberg, may I interrupt.
11 CHAIRMAN FEINBERG: Go ahead.
12 MR. SILLS: Mr. Feinberg, I have an
13 unbreakable personal commitment on
14 September 1st and September 2nd. My
15 18-year-old son is going to college.
16 CHAIRMAN FEINBERG: Depending on
17 where he's going -- off the record
18 MR. SILLS: So if -- and it is Labor
19 Day weekend, those, September 2nd is a
20 difficult --
21 CHAIRMAN FEINBERG: Wait a minute.
22 September 2nd is the Saturday, is that
23 right?
24 MR. SILLS: I believe that's right.
25 CHAIRMAN FEINBERG: We are meeting on

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2 CHAIRMAN FEINBERG: The panel has
3 caucused. I will ask my fellow
4 arbitrators to comment if I misstate this
5 because it is all oral, I have just
6 scribbled down some notes.
7 First, the parties are reminded,
8 particularly Storm, that they have until
9 5 p.m. on August 31st to contact the panel
10 and Telenor with information concerning
11 the September 5th availability of either
12 of the two witnesses, Wack or Nilov.
13 Just a reminder, that is not news.
14 That we want to hear from Storm whether
15 those two witnesses plan to attend the
16 September 5th hearing.
17 ARBITRATOR CRAIG: Or file
18 affidavits.
19 CHAIRMAN FEINBERG: Or file
20 affidavits.
21 If they do either, we will give
22 Telenor until 5 p.m. on September 2nd to
23 respond, either with a letter, witnesses
24 that it plans to call on September 5th in
25 response to those witnesses, affidavits,

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2 5th. What do you want?
3 ARBITRATOR JENTES: Could I suggest,
4 can we move the Storm thing forward to a
5 date a little bit earlier in August?
6 MR. VAN TOL: No, that's going to be
7 problematic. We were going to be
8 stretched to make August 31st just because
9 of vacations.
10 CHAIRMAN FEINBERG: Well, what are
11 you proposing?
12 MR. SILLS: Well, if they could, as
13 Mr. Jentes suggests, it's been a while,
14 either get it in earlier the week before
15 Labor Day, we will respond by the end of
16 that week or I know the 5th is reserved.
17 CHAIRMAN FEINBERG: The 5th is
18 reserved. We can't deal with the 5th.
19 The 4th won't help you, that is Labor Day.
20 MR. VAN TOL: Can we move the 5th
21 back?
22 CHAIRMAN FEINBERG: No.
23 MR. VAN TOL: At all?
24 CHAIRMAN FEINBERG: It will be too
25 difficult to schedule.

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 2 MR. SILLS: And over a holiday
 3 weekend, contact a witness.
 4 CHAIRMAN FEINBERG: First of all, it
 5 may be moot. Who knows. All I can
 6 suggest, Bob, is we are all laboring under
 7 some real constraints here and,
 8 fortunately, here's my view, Orrick is a
 9 great big firm, great and big, and there
 10 are other people, and hopefully you can
 11 get us -- I mean, we will have to deal
 12 with it.
 13 MR. SILLS: Well, under those
 14 circumstances, and I am sure my colleagues
 15 will not appreciate what I am about to
 16 say, if they are going to take until the
 17 31st, I frankly don't see why they need
 18 that much time, could we have until the
 19 4th.
 20 CHAIRMAN FEINBERG: Yes, but it
 21 means, what about Bill's point? Surely
 22 you can move it back two days to the 29th
 23 in order to accommodate Orrick and give
 24 them until the 31st at five o'clock. I
 25 mean --

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 2 that in those last 48 hours you are going
 3 to learn one thing or another. So,
 4 hopefully, you will be able to notify the
 5 parties by August 29th so that Bob and
 6 Telenor can respond by the 31st rather
 7 than September 4th, which won't give
 8 anybody much time. But in light of that,
 9 we will at least know that.
 10 MR. VAN TOL: Understood.
 11 CHAIRMAN FEINBERG: So, let me
 12 continue then with the rest of the order.
 13 By August 31st, will each side
 14 provide the arbitrators with each side's
 15 finding of fact concerning Storm's motion?
 16 Both sides have done it orally,
 17 frankly, in the course of the last four or
 18 five hours, but will each side in writing,
 19 in a memo not to exceed 25 pages, and my
 20 view is brevity is a virtue, will each
 21 side provide the arbitrators
 22 simultaneously, exchanging whenever by
 23 5 p.m. on the 31st, its proposed findings
 24 of fact on Storm's motion?
 25 Next, without in any way anticipating

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 2 MR. VAN TOL: Well, I was actually --
 3 I had instructions from my client to try
 4 to get more time and I realize that is not
 5 going to happen, so I would be
 6 hard-pressed to go back and say less time,
 7 because, in particular, it's hard to get
 8 people in Russia during the last two weeks
 9 of August.
 10 CHAIRMAN FEINBERG: It's apparently
 11 hard to get people in Russia any time.
 12 MR. VAN TOL: I will agree with that,
 13 too.
 14 CHAIRMAN FEINBERG: I don't know what
 15 else to say.
 16 I really don't think it will be
 17 productive to consider moving
 18 September 5th. That is a date that the
 19 arbitrators have gone around and around on
 20 and it's really a very -- window
 21 September 5th, so I can only say that it's
 22 August 31st, with a caveat, Pieter, that I
 23 hope that you can notify the panel and the
 24 other side by August 29th.
 25 I mean, it's hard for me to believe

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 2 how the panel will rule, because the panel
 3 is undecided right now as to how to rule.
 4 Without in any way anticipating or sending
 5 any signal whatsoever, will the parties
 6 when we meet, if we meet on September 5th,
 7 provide hopefully a joint agreement on a
 8 prehearing schedule on the merits,
 9 including an end date for the hearing on
 10 the merits.
 11 Now, I want to emphasize don't read
 12 anything into this on the jurisdictional
 13 motion and how we are going to decide it.
 14 The panel just feels that we want to, if
 15 we decide to go forward, we want to be
 16 ready, hopefully, with as much of a
 17 consensual agreement on schedule as we can
 18 possibly consensually agree upon.
 19 And the parties have made it very
 20 clear that based on our ruling, one or
 21 both or somebody may be running into
 22 federal court seeking a stay. That may
 23 be, but can we at least try and get
 24 together with a prehearing schedule
 25 consensual.

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2 And we have, the panel wants to
3 emphasize we are looking as a panel at a
4 prompt hearing.

5 So when the parties meet to try to
6 work out a prehearing schedule, the panel
7 wishes to emphasize promptness in terms of
8 getting to the merits of the dispute if
9 that is the way we so decide.

10 Have I left out anything?

11 ARBITRATOR JENTES: I would only
12 express my own views in this document that
13 we have asked for in the 25 pages, I think
14 you ought to give some consideration to
15 framing it as a partial award. It may not
16 be a format that the panel will end up
17 with, but I think we would appreciate
18 getting your thoughts on whether or not
19 that would be a possible format and then
20 what would be the support for the partial
21 award.

22 If it's not a partial award, then it
23 would be some kind of an order either
24 denying or granting the motion to dismiss
25 either way. We would be interested in how

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2 MR. VAN TOL: Okay. Understood.

3 CHAIRMAN FEINBERG: Now, Storm
4 triggers a great deal of this. It is
5 entirely possible there will be no meeting
6 on September 5th. If Storm doesn't call
7 its two witnesses or advance any further
8 evidentiary proof and stands on the
9 record, then we have the findings of fact,
10 both sides have submitted that by
11 August 31st.

12 Robert can go to college without
13 worrying about September 2nd, and we will
14 not meet on September 5th, and instead the
15 panel will convene telephonically or in
16 person, and will render its decision
17 following the closing of the record.

18 So, September 5th keep open, but
19 Storm basically will decide whether or not
20 we are meeting on September 5th.

21 Anything else?

22 MR. SILLS: Mr. Feinberg, on the
23 first point, with Storm's insistence to
24 holding to that August 31st date, could we
25 ask for an indication at least if,

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2 you would think of the procedural kind of
3 approach towards the ruling.

4 MR. VAN TOL: And picking up on that,
5 is it the tribunal's wish to see an
6 articulation of the legal standards as
7 well, or do you have enough law, do you
8 think, would you like us to encapsulate in
9 the planned award?

10 ARBITRATOR JENTES: Again, I'm
11 speaking for only myself, I think in 25
12 pages it ought to include a discussion of
13 the legal and evidentiary predicate for
14 any award or order that we would issue.

15 ARBITRATOR CRAIG: But since we are
16 talking format, and speaking for myself, I
17 would appreciate it if the proposed
18 finding of fact had a reference to the
19 exhibit or the documentation that supports
20 the finding so it's easy to refer back to
21 the materials that you have provided us.

22 And there is a traditional way for
23 preparing proposed findings of fact and
24 having discussions of the standards of law
25 that apply later on.

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2 understanding that it may not come to pass
3 by say the 29th as not as to actual
4 testimony but as to whether or not, and I
5 understand it's restricted to Mr. Nilov
6 and Mr. Wack, whether either or both of
7 those gentlemen will be providing evidence
8 in some way so that we can at least
9 prepare.

10 MR. VAN TOL: That was my intent,
11 that's how I took your order.

12 CHAIRMAN FEINBERG: The answer is
13 yes, yes.

14 Does anybody else, there are a lot of
15 people in this room and only a few have
16 said anything. Does anybody else, this is
17 your last opportunity before we adjourn.

18 Are we missing anything? Does
19 anybody not understand something? This
20 has been an extraordinary day for the
21 arbitrators listening to the very cogent
22 arguments and testimony.

23 ARBITRATOR CRAIG: Could I ask,
24 Mr. Sills, on behalf of Telenor, is
25 Telenor satisfied with the record in the

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2 event that Storm doesn't proffer any more
3 factual evidence, that you have had an
4 adequate opportunity to put your case on
5 in terms of evidence.

6 MR. SILLS: It's our position,
7 Mr. Craig, that both parties have had an
8 adequate opportunity and we certainly
9 think we have. So if they, as we hope
10 they will, elect not to present further
11 testimony on the 5th, we are not
12 going to be coming back to the panel
13 asking for permission to put in further
14 proof.

15 MR. VAN TOL: May I pick up on that,
16 so far we have been talking about Mr.
17 Wack and Mr. Nilov. What was always
18 before we received Telenor's submission
19 last Wednesday when we were quite
20 surprised to see extensive discussion of
21 negotiation around the voting agreement
22 and names of the other people.

23 If we are able to get forth witnesses
24 that we believe are going to be more
25 knowledgeable about those events, is it

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1 Proceedings
2 acceptable with the tribunal as long as we
3 provide notice that we provide evidence
4 from them instead of Mr. Nilov or
5 Mr. Wack.

6 CHAIRMAN FEINBERG: We will take that
7 under advisement.

8 MR. VAN TOL: I am merely checking, I
9 have no knowledge one way or the other
10 because we haven't had a chance to track
11 those individuals down.

12 ARBITRATOR CRAIG: We're looking
13 forward to the opportunity of asking you
14 the same question that I have just asked
15 Mr. Wills at some point.

16 Have you had an adequate opportunity
17 even though there has got to be a cutoff
18 at some point?

19 MR. SILLS: Is the proposal that's
20 just been made that some witness whose
21 identity we are now unaware might show up
22 in written form on the day before Labor
23 Day weekend and we would have until Labor
24 Day to pull together both a record about
25 that witness and any rebuttal?

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1 Proceedings
2 MR. VAN TOL: Well, Mr. Sills, that
3 is just what I did with your submission of
4 Wednesday.

5 CHAIRMAN FEINBERG: Excuse me, we
6 will take it under advisement. We
7 understand, Mr. Sills, you are not pleased
8 by that caveat.

9 On the other hand, we haven't granted
10 Pieter's request. We just said if that
11 actuality occurs, which Peter has
12 expressly said is purely hypothetical, we
13 will take it under advisement.

14 Anything else?

15 ARBITRATOR JENTES: When we adjourn
16 and go off the record, could we meet with
17 Bob and Pieter for a minute?

18 MR. SILLS: Of course.

19 ARBITRATOR JENTES: Off the record.

20 MR. VAN TOL: Absolutely.

21 CHAIRMAN FEINBERG: Also, will the
22 parties at some point fairly quickly let
23 the panel know where we will meet
24 September 5th, assuming we meet?

25 MR. VAN TOL: Do you want to keep

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1 Proceedings
2 ping-ponging?

3 MR. SILLS: Or sort of informal
4 agreement is that we will take turns
5 hosting, so I think it's Pieter's turn on
6 the 5th and subsequent hearing would be
7 here and so on.

8 MR. VAN TOL: The bar has been raised
9 a bit on the food.

10 CHAIRMAN FEINBERG: I am assuming
11 again, you will correct me after you
12 consult, we will begin at 9 a.m.

13 ARBITRATOR JENTES: Bear in mind
14 that this is right after the Labor Day
15 weekend.

16 MR. VAN TOL: Yes, understood.

17 ARBITRATOR JENTES: And that's why
18 the advance notice that Bob asked for is
19 really important for somebody like me
20 who's got to get into New York the night
21 before.

22 MR. VAN TOL: I agree, it will, the
23 last thing I want to do is inconvenience
24 Mr. Sills or anybody else. So I am
25 cognizant of that.

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1 Proceedings
2 CHAIRMAN FEINBERG: This hearing is
3 adjourned and I thank, and the panel
4 thanks all participants.
5 (Time Noted: 4:15 p.m.)
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2
3 C E R T I F I C A T I O N
4

5 I, BONNIE ATELLA PRUSZYNSKI, a
6 Registered Professional Reporter and Notary
7 Public, within and for the State of New York,
8 do hereby certify that I reported the
9 proceedings in the within-entitled matter, on
10 August 14, 2006, and that this is an accurate
11 transcription of these proceedings.

12 IN WITNESS WHEREOF, I have hereunto
13 set my hand this 22nd day of August, 2006.
14

15
16 BONNIE ATELLA PRUSZYNSKI
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